No. 22621

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

The Valley Disposal Co., Inc., a corporation,

Appellant,

vs.

Silver State Disposal Co., Clark Sanitation, Inc., Disposal Transportation, Inc., Henderson Disposal Service, Inc., Disposal Investments, Inc., Lester L. LaFortune, John Iniz, and Alfred Iniz,

Appellees.

An Appeal From a Summary Judgment.

OPENING BRIEF FOR APPELLANT.

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No. 22762

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SUN VALLEY DISPOSAL CO., INC., a corporation,

Appellant,

vs.

SILVER STATE DISPOSAL CO., CLARK SANITATION, INC., DISPOSAL TRANSPORTATION, INC., HENDERSON DISPOSAL SERVICE, INC., DISPOSAL INVESTMENTS, INC., LESTER L. LAFORTUNE, JOHN ISOLA, AND ALFRED ISOLA,

Appellees.

An Appeal From a Summary Judgment.

OPENING BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

These proceedings were instituted by appellant against appellees under the federal antitrust laws, specifically Title 15, U.S.C. Section 15, being part of the Act of Congress of July 2, 1890, c. 649, 26 Stat. 209, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies". A summary judgment was entered in favor of appellees and against appellant by the Honorable Bruce

R. Thompson, in the United States District Court for the District of Nevada [R. 1091].[1] Appellant herein appealed from the summary judgment [R. 1101]. This Court has jurisdiction to review the judgment under 28 U.S.C., Secs. 1291 and 1294(1).

STATEMENT OF THE CASE.

A. NATURE OF THE CASE.

Appellant claims that the defendants-appellees have violated Sections 1 and 2 of the Sherman Act, 15 U.S.C.A., Sections 1 and 2. Appellant engaged in garbage pick-up and disposal service and container rental activity [Tr. 1121-24 to 1121-26]. Appellant seeks treble damages under Section 4 of the Clayton Act, 15 U.S.C.A., Section 15, by reason of the destruction of its business, which it conducted from about January 1, 1961 to April 4, 1965. Appellant is also the assignee of R. J. Collet, the owner of equipment used by appellant exclusively in the conduct of its business, and as assignee claims damages for the compulsory sale of equipment at distress prices [R. 109, 110, 128, 129, 131, 132].

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[1]The Clerk's record is referred to herein as "R . . .". The Clerk's record includes the depositions and exhibits therein. The record is paginated continuously from R. 1 to R. 1120. The record thereafter includes 626 pages of pleadings filed by appellant on June 13, 1966 in opposition to the motion for summary judgment, the first page of which bears the numbers "1121" and "1" and the subsequent pages of which bear only the numbers "2" to "626", inclusive; by reason of this pagination, the said 626 pages are referred to herein as "R. 1121-1 to R. 1121-626, inclusive". The record thereafter resumes at R. 1122 with the deposition of Max Chason filed December 28, 1965, and continues thereafter until R. 6945.

Section 4 of the Clayton Act, October 14, 1914, Chapter 323, Section 4, 38 Stat. 731, 15 U.S. Code, Section 15 states:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws may sue therefore in the District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Sections 1 and 2 of the Sherman Act provide, Sherman Act, Sections 1 and 2, July 2, 1890, chapter 647, Sections 1, 2, 26 Stat. 209, 15 U.S.C., Sections 1, 2:

> "Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared illegal . . .
>
> "Section 2: Every person who shall monopolize or attempt to monopolize or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

B. THE PLEADINGS.

The Amended Complaint charges, *inter alia*, that the defendants and others acting in concert with them have entered into contracts, combinations and conspiracies to restrain unreasonably, have attempted to monopolize,

have combined and conspired to monopolize and have monopolized interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act [R. 120]. The Amended Complaint further alleges the specific objectives and the means utilized to achieve said objectives [R. 121-127]. The Amended Complaint further alleges the quantitative and qualitative nature of the interstate trade and commerce [R. 111-116].

The defendants filed a motion for summary judgment on the grounds that no genuine factual issues existed and that: (1) the acts complained of did not involve interstate commerce or have a substantial and direct effect on interstate commerce; or (2) the acts complained of were brought about, authorized, sanctionized and approved by an act of the legislature of the State of Nevada [R. 405-406].

The appellant thereafter engaged in extensive pretrial discovery, as a result of which the record in opposition to the motion for summary judgment contains depositions, affidavits, answers to interrogatories, admissions and pleadings.

C. THE PARTIES.

Appellant-plaintiff, Sun Valley Disposal Co., Inc. (hereinafter called "Sun Valley") engaged in a garbage pick-up and disposal service and container rental activity in the unincorporated area[2] of Clark County, Nevada, from January 1, 1961 to April 4, 1965.

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[2]The incorporated cities located within Clark County, Nevada, were Las Vegas, North Las Vegas, Henderson and Boulder City.

Silver State Disposal Company (hereinafter called "Silver State Disposal") conducted a garbage pick-up and disposal service in the City of Las Vegas under an exclusive contract from the City of Las Vegas and operated a garbage dumpsite in the unincorporated area of Clark County, Nevada.

Clark Sanitation, Inc. (hereinafter called "Clark Sanitation") conducted a garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada, and since April 4, 1965 had held an exclusive franchise in Clark County, Nevada, for that purpose.

Disposal Transportation, Inc. (hereinafter called "Disposal Transportation") conducted a garbage pick-up and disposal service in the City of North Las Vegas under an exclusive contract from the City of North Las Vegas.

Henderson Disposal Service, Inc. (hereinafter called "Henderson Disposal") conducted a garbage pick-up and disposal service in the cities of Henderson, Nevada, Boulder City, Nevada, and Page, Arizona.

Disposal Investment, Inc. (hereinafter called "Disposal Investment") engaged in activities related to the garbage pick-up and disposal services conducted by Silver State Disposal, Clark Sanitation, Disposal Transportation and Henderson Disposal, including the sale and rental of containers.

Lester L. LaFortune, John Isola and Alfred Isola, have acted as officers and directors of Silver State Disposal, Clark Sanitation, Disposal Transportation, Henderson Disposal and Disposal Investments.

D. STATEMENT OF FACTS.

1. Container Merchandising as a Separate Line of Interstate Commerce Affected by the Elimination of the Depressive Influence of Independents on Rental Rates.

(a) Container Rental Activity as a Seperate and Distinct Operation:

"The container business" was the phrase used by an equipment distributor to describe the operations engaged in throughout the country whereby rentals were charged for containers used by customers of the garbage pick-up and disposal service [R. 6460]. Prior to 1958 Southern Nevada Disposal Service, Inc., which was controlled by one Max Chason, leased containers of one cubic yard capcity to customer in the City of Las Vegas, City of North Las Vegas and the unincorporated area of Clark County, Nevada [R. 4835-4839; 4847]. In January 1958, Lester L. LaFortune acquired an option to purchase Chason's controlling stock in Southern Nevada Disposal Service, Inc.; in April 1958, three corporations were formed, including Disposal Investments, Inc.; in May 1958, the option was exercised [R. 176]. Upon its formation as a corporation, Disposal Investments were designated as the merchandising company to perform the function of renting containers [R. 4842-4844]. From the date of its inception until the time of the ligation, Disposal Investments had been engaged in the sale and leasing of containers to businesses and residents located within Clark County, Nevada [R. 181].

In 1959, Disposal Investments acquired six additional one-yard containers, in 1961 it acquired 175 additional one-yard containers, and by September 30, 1965 it had acquired a total of 2,144 containers [R. 183, 6461]. After Sun Valley commenced its operation in January 1961, Sun Valley rented two-yard and three-yard containers to its customers in the unincorporated area of Clark County, Nevada, which led Disposal Investments as a competitor to increase the number of its containers in sizes larger than one-yard capacity [R. 4851-4852, 5713-5714, 5716].

Disposal Investments rented containers directly to apartment houses, restaurants and motels, to which it billed for the rentals separately [R. 4904-4907]. Disposal Investments had 1,033 container accounts [R. 183]. One of the accounts of Disposal Investments was Clark Sanitation, Inc., an affiliated company, which in turn leased containers to approximately 90 container accounts in the unincorporated area of Clark County, Nevada, including the Strip hotels [R. 708-712, 4906]. Sun Valley leased containers to apartment houses, motels and Strip hotels in the unincorporated area of Clark County, Nevada [R. 4707].

Disposal Investments has maintained a uniform container rental rate structure throughout Clark County over the years [R. 827, 5712]:

Size	Monthly Rate
1 cubic yard capacity	$ 7.50
1½ cubic yard capacity	8.75
2 cubic yard capacity	10.00
3 cubic yard capacity	12.50
4 cubic yard capacity	15.00

Container rental rates were unregulated by any governmental body [R. 4838]. Disposal Investments maintained a separate bookkeeping account for container rental income [R. 5787]. Its tax returns were never consolidated with those of the garbage pick-up and disposal service companies [R. 5819-5820]. Its financial statements were separately reported [R. 1121-41 to 69].

Since there was delivery and maintenance expense involving a workshop for repairing containers in order to engage in container rental activity, it was necessary to build up a volume container business to make a profit [R. 4882-4883].

In the defendants' consolidated financial statement for the year ended September 30, 1964, the following comment appears [R. 1121-83]:

"The only capital outlay of any substantial proportions for depreciable operating assets during the year under review was made by Disposal Investments, Inc., which invested $49,389.50 in additional containers for leasing. The leasing of containers has become a large volume operation, and accounted for 34.817% of the gross revenue and 62.998% of the gross operating prof-

it before administrative expense of Disposal Investments, Inc. for the current year. The following is a study of the container rental operations for the years ending September 30, 1963 and 1964:

	Year Ended 9/30/63	Year Ended 9/30/64
Gross revenue from container rentals	$72,874.46	$136,808.39
Rental expenses before depreciation	8,128.67	20,974.13
Net rental income before depreciation	64,745.79	115,834.26
Provision for depreciation of containers	28,487.23	38,917.52
Net container rental income	$36,258.56	$ 76,916.74
Delivery and maintenance labor component of above expenses	$ 6,169.67	$ 11,923.52
Net rental income return on cost investment in containers (valued at year-end)	25.235%	39.984%

Although it was necessary to build up a volume container business to make a profit, manufacturers and distributors did sell containers directly to certain Las Vegas garbage pick-up customers who had Disposal Investments remove its containers; and to that extent the manufacturers and distributors competed with Disposal Investments [R. 4895-4897].

This led to an application by Disposal Investments for a container franchise in the City of Las Vegas, which was the subject of a memorandum from the City Attorney to the Mayor and Board of Commissioners of the City of Las Vegas rejecting the application [R. 996-997].

The parties stipulated that Disposal Investments, Inc. prepared a document dated June 22, 1966 addressed to the City Commissioners of Las Vegas [R. 830, 822-827]. In a pertinent part of that document, Disposal Investments represented as follows: That containers sold and leased within the city limits of Las Vegas accrued revenue to Disposal Investments [R. 823]; that it desired an exclusive contract or franchise to supply containers by lease or sale in Las Vegas [R. 824]; that a growth factor of containers placed within the city of Las Vegas, Nevada, based upon the average yearly growth during the years ended September 30, 1962 to September 30, 1965, was 43.7% per year and a conservative estimate would be for the future a 15% annual growth factor for containers [R. 826]; that billing for containers leased within the City of Las Vegas for the month of May 1966 was $9,047.50 [R. 287].

The following data shows the amount of container business of Disposal Investments [R. 171, 45, 50, 55, 59, 65, 69]:

Year	Gross Rental Revenue	Container Rental Income
FYE 9-30-60	$ 5,595.76	$ 3,575.73
FYE 9-30-61	12,538.17	3,534.70
FYE 9-30-62	25,445.48	(607.91)
FYE 9-30-63	56,288.83	19,809.70
FYE 9-30-64	115,798.98	56,044.10
FYE 9-30-65	155,075.98	90,379.00

(b) Regular and Consistent Movement in Interstate Commerce:

Sun Valley's containers were shipped from outside the State of Nevada [R. 4591]. Disposal Investment's containers were shipped from outside the State of Nevada [R. 4883]. Sun Valley's shipments were set forth in an affidavit of R. J. Collet [R. 842-843]. Disposal Investments obtained its shipments once a week for immediate delivery to customers [R. 4785-4786]. Disposal Investments delivered containers to its customers pursuant to specific orders and maintained an inventory in its yard [R. 5983-5985]. The containers were stock items, manufactured in quantity [R. 5345]. The containers had to be replaced about every six years [R. 843, 4784, 5355]. The annual purchases by Disposal Investments of containers have been as follows [R. 1121-2]:

Year	Annual Purchases
FYE 9-30-61	$26,417.94
FYE 9-30-62	34,139.46
FYE 9-30-63	61,118.93
FYE 9-30-64	48,686.85
FYE 9-30-65	41,430.27

(c) Depressive Influence of Independents on Rental Rates:

The goal of Disposal Investments was to maintain a uniform container rental rate structure throughout Clark County [R. 4901-4902]. Disposal Investments had certain large customers which managed apartment house properties in the City of Las Vegas, City of North Las Vegas and the unincorporated area of Clark County [R. 4893-4895, 4899-4900]. Disposal Investments admitted that any reduction of container rental rates in the unincorporated area of Clark County would influence its rate structure in the City of Las Vegas or City of North Las Vegas; for a customer in the City of Las Vegas would ask why he was paying $5 on the Strip for example, which was in the unincorporated area of Clark County, and was paying $7.50 in the City of Las Vegas [R. 4902]. Rate reduction in the unincorporated area of Clark County would inevitably lead to rate reduction in the cities [R. 4720].

Disposal Investments admitted that Sun Valley was exerting a competitive influence on the rate structure through its solicitation of apartment house accounts in the unincorporated area of Clark County [R. 4714-4715, 4720]. Disposal Investments considered apartment houses to be container rental accounts [R. 4904-4905].

Disposal Investments admitted that certain of its customers obtained containers on the open market directly from the manufacturers or outside suppliers [R. 4895-4897, 4900].

(d) Defendants' Attitude of Hostility Toward the Independants Due to Their Depressive Influence on a Uniform Rate Structure:

Upon entry into the business the defendants revealed hostility to the independents in Clark County, because a lower price structure in the garbage pick-up and disposal operation would adversely affect the ability of the defendants to hold the price line in the pick-up territories where they held franchises.

The record contains the following evidence by deponent Chason with regard to the defendants' attitude toward the independent that operated in the City of Henderson before the defendants bought him out [R. 1142]:

> "A. I'm not positive who brought this up, whether Lester La Fortune brought it up or Al Isola when we returned back to the warehouse, stating that—I am trying to find a word to use for that—that a competitor who was small can hurt a larger competitor and by this man Wenchell holding the prices down can hurt our company in Las Vegas, so the best method would be either to buy him out or to try to get him to increase his rates. And I believe Lester La Fortune said it was cheaper to buy him out than to try to break him."

The record contains the following evidence by deponent Chason with regard to the defendants' attitude toward the independent that operated Clark Sanitation, Inc. in competition with the defendants in the unincorporated area of Clark County before the defendants bought Clark Sanitation, Inc. [R. 1134]:

> "A. . . . Lester said that we ought to do the same thing that they are doing, if they are going

to cut our prices, we will go and undercut them, and he also said that he thinks he can get some of the accounts back by cutting prices that they have already taken away from us * * * (T)he suggestion was that if they don't take the business back they should buy him out. Lester thought he might be able to buy him out for a reasonable figure because they hadn't gotten anywhere yet with the—with the undercutting prices . . ."

These statements were followed in each case by acquisitions accompanied by covenants against competition. In a ten-month period, January to October 1958, the defendants removed every independent from each pick-up territory in Clark County and thus acquired what appeared to be at that time complete control of the garbage pick-up and disposal service and container rental activity in Clark County [R. 1446-1449, 1463-1464, 1577-1589, 1356-1360, 1370, 1378-1380, 398-404].

The option which LaFortune obtained from Chason to buy his controlling stock in Southern Nevada Disposal Service, Inc. contained no covenant or condition that Chason execute a covenant not to compete [R. 187-191]. On April 29, 1958, that option, though containing no requirement for a covenant against competition, was exercised [R. 1160]. Later, Chason did sign a five-year covenant against competition, after it was demanded by the buyer who had previously exercised the option [R. 398, 509, 512].

In June 1958, when the independent operator in the City of Boulder City was bought out, according to the deposition of the independent Peelen, the buyer de-

manded that Peelen agree not to re-enter the garbage business for five years and stated that the covenant should be broad because Peelen had roots in the entire area and LaFortune did not want Peelen to try to re-enter the garbage business in Clark County or any other place he had been except Kingman, Arizona. Peelen further testified that, although he expected to give a covenant against competition in the territory which was the subject of sale, that is, the City of Boulder City, the covenant not to compete which he signed was too broad, because it covered the entire Clark County [R. 1356-1360, 1370, 1378-1380].

In October 1958, when the independent competitor in the unincorporated area of Clark County, namely, Clark Sanitation, Inc. was integrated into the defendants' corporate combination, a seven-year covenant not to compete was obtained not only from the shareholders who sold their stock, but also from a key officer and broadly covered the entire Clark County as well as related activities [R. 4348-4353]. The deal was made after Clark Sanitation, Inc. threatened to engage in the profitable operation of collecting cardboard in the City of Las Vegas for resale in California in competition with Southern Nevada Disposal Service, Inc., a company at that time controlled by the defendants [R. 4238-4242]

(e) Anticompetitive Practices Directed Toward the Elimination of Sun Valley as an Independent:

In August 1960, Sun Valley was formed as a Nevada corporation and its equipment was purchased [R. 4502-4503]. On October 30, 1960 a Clark County business license was issued to Sun Valley [R. 1121-23 to 24]. LaFortune testified that he thought Sun

Valley was backed by the same people who backed Clark Sanitation, Inc., which the defendants had bought out two years before [R. 399-404, 4798-4799]. On November 15, 1960, Sun Valley wrote to the County Commissioners for clarification of its right to use the garbage dumpsite located in the unincorporated area of Clark County [R. 1121-33]. On November 17, 1960, Clark Sanitation wrote to the County Commissioners requesting an exclusive franchise for unincorporated Clark County [R. 1121-34].[3]

On about January 1, 1961, Sun Valley commenced its garbage pick-up and disposal service in unincorporated Clark County [R. 1121-24].

Subsequent commercial practices engaged in by the defendants as a combination were as follows: Use of the "deep pocket" financial power of Silver State Disposal through its Las Vegas franchise to make a loan to Clark Sanitation, thereby sustaining operations after about January 1961, at a loss in unincorporated Clark County [R. 1121-75, 76, 80, 154, 158, 149 to 165]; use of the "deep pocket" financial power of Silver State Disposal through its Las Vegas franchise, Disposal Transportation through its North Las Vegas franchise and Disposal Investment, between about September 1960 and September 1963, to make

[3]In Paragraphs D (4) and D (5), *infra*, of the Statement of Facts, there is recited the facts demonstrating the use of procedures which gave an unfair advantage to Clark Sanitation, Inc., handicapped Sun Valley, violated the statutory requirement of competitive bidding and thus led to action beyond the outer periphery of the authority of the County Commissioners, whereby Sun Valley was ultimately eliminated as an independent in the unincorporated area of Clark County on about April 4, 1965, and the facts demonstrating misrepresentations in Clark Sanitation's proposal for the exclusive franchise.

interest-free advances to Clark Sanitation, thereby enabling Clark Sanitation to pass its operating costs on to said corporations [R. 1121-149 to 165]; deferral of collection of account receivables from certain customers of Clark Sanitation, who became customers of Sun Valley in about January 1961, until their return to Clark Sanitation [R. 1121-152]; adoption and maintenance by Clark Sanitation of a combination rate for providing garbage collection and disposal service and container leasing to a class of customers in unincorporated Clark County, which did not yield sufficient revenue to cover operating costs, thereby enabling Clark Sanitation to impose a prize squeeze [R. 4906, 708-714, 1121-26]; adoption in about September 1963, retroactive for one year, and maintenance thereafter by Disposal Investments of a discriminatory reduction of container rental charged to Clark Sanitation for containers which Clark Sanitation furnished at a combination rate with garbage collection and disposal service to a class of customers in unincorporated Clark County, thereby enabling Clark Sanitation to pass its operating costs on to Disposal Investments [R. 638, 694, 708-714]; use of an accounting method of allocating the expense of jointly used trucks between Silver State Disposal and Clark Sanitation after about June 1963, pursuant to which records of the facts on which said allocation was purportedly based were destroyed, thereby enabling Clark Sanitation to conceal a passing of its operating costs on to Silver State Disposal [R. 59, 60]; use of the borrowing capacity of Silver State Disposal, based on its Las Vegas franchise, and of Disposal Investments to obtain the use of trucks, equipment and containers by Clark Sanitation [R. 2504-2505, 2519-

2524, 2534-2537]; participation in an agreement, understanding, plan or program in about April 1963, with Arata Pontiac, a San Francisco equipment distributor, whereby Silver State Disposal received from Arata Pontiac terms and prices, in connection with the purchase of trucks and equipment, which Arata Pontiac would not make available to other garbage collection and disposal operators [R. 2523-2524, 2728, 6397-6400].

2. Advantages in Their Own Interstate Dealings Resulting from Defendants' Trade Practices.

(a) Interstate Business of Defendants:

The defendants have combined their corporate and individual bonding capacities to maintain in full force and effect, for the benefit of themselves or their licensees, franchises and exclusive contracts for supplying garbage pick-up and disposal service in selected territories in Nevada (Las Vegas, North Las Vegas, Henderson, Boulder City, unincorporated Clark County) and Arizona (Page) [R. 2964, 3018-3019, 3031, 3152-3155, 3370, 3373, 3378, 3380-3391]. Said franchises and exclusive contracts have been the subject of commercial barter, to-wit: A sale involving $391,313.84 was conditioned on the Cities of Las Vegas and North Las Vegas consenting to the transfer of the franchises granted by said cities [R. 1154]. The Henderson franchise was sold as part of a $25,000 transaction [R. 1577]. The Page, Arizona, contract was sold as part of a $10,000 transaction [R. 1121-19]; and the Page, Arizona, contract encompassed an area in Arizona owned by private persons since about 1959 or 1960, so that the contract was not merely a contract to provide

service to the United States Government, but also involved the privilege to supply garbage pick-up and disposal service to private customers in Page, Arizona [R. 2096, 2113, 3660, 3669]. The Page, Arizona, operation involved periodic visits by Nevada management to supervise the Arizona operation [R. 703]. The revenue checks were mailed each month across state lines [R. 700]. The contracts were negotiated by the transmittal of documents through interstate mail [R. 701]. The trade name, Henderson Disposal Service, which was used in Nevada operations, was licensed for use in Arizona [R. 2371-2373, 3747-3750, 3752-3753, 3759-3762]. The equipment used for the Arizona operation was shipped from Nevada [R. 3735-3736].

(b) Existing and Potential Competition to Defendants' Interstate Business:

Interstate competition during this period included Parks and Sons, which held contracts and franchises in Idaho, Oregon and Arizona [R. 4372-4381]. Its trucks and personnel were available for multistate operations [R. 4391-4395]. Its management for the operations in three states was integrated [R. 4396-4398]. It could have fitted the Page, Arizona, operation into its system [R. 4401-4406]. It received no notice of an opportunity to bid the Page, Arizona, contract or it would have submitted a bid [R. 4406-4407]. It was also interested in buying into the Las Vegas area at one time and had serious discussions to purchase the Las Vegas operation in about 1956 to 1957 [R. 4407-4408]. It was under the impression that bidding in the Las Vegas area was foreclosed by a franchise [R. 4431].

3. Customer Relationship of Defendants With Arata Pontiac as Out-of-State Supplier of Elgin-Leach Equipment.

Substantially all of the trucks and equipment used by the garbage pick-up and disposal service defendants were purchased under contracts with Arata Pontiac as seller, Silver State Disposal as buyer and Bank of America financing the transactions through an Arata Pontiac dealership relationship [R. 173-174, 2519-2524, 2534-2537]. The credit rating of Silver State Disposal, supported by the City of Las Vegas franchise, was the basis of the purchases [R. 2503-2504, 2728]. Arata Pontiac was a San Francisco business which held a Pontiac automobile and International truck dealership [R. 2661]. Arata Pontiac also sold garbage pick-up and disposal equipment for use by the defendant companies in Clark County [R. 2789-2820]. David Arata, who was a stockholder, officer and director of Arata Pontiac, was also a director of the defendant companies and participated in frequent discussions as to their business policies [R. 4673-4676].

Through its Pontiac automobile-International truck dealership, Arata Pontiac had established an excellent credit rating with the Bank of America, which enabled it to arrange financing for garbage trucks and Leach bodies [R. 2459-2463, 2511]. In 1955 Arata Pontiac, through Arata Equipment Co., became distributor in Northern California for the Elgin-Leach equipment line [R. 2842, 2874]. In 1959, the distributorship was expanded to include Southern Nevada [R. 2903].

The basis for the expansion of the distributorship to Nevada was stated by Alvin Arata. "They had to have —these people, Isolas and LaFortune. And they had to have somebody representing them in that area." [R 2845]. The Aratas in 1958 had invested money toward financing the LaFortune acquisition of the controlling stock of Chason in the Southern Nevada operations for garbage pick-up and disposal service [R. 2694]. Therefore, the Aratas had the contact with the defendants as equipment customers [R. 2845].

Arata Pontiac knew that the trucks, though purchased on the basis of the borrowing capacity of Silver State Disposal, would be used on routes in unincorporated Clark County operated by Clark Sanitation, Inc. [R. 2749-4751]. Alvin Arata, a stockholder, officer and director of Arata Pontiac, advised Silver State Disposal as to the maximum number of front-end loaders to purchase for large-volume commercial pick-ups, since Leach did not at the time manufacture front-end loaders and Arata Pontiac wanted to maximize the Leach sales under its franchise and minimize Silver State Disposal's purchase of competitive equipment [R. 2827-2830].

In April 1963, Arata Pontiac allowed Silver State Disposal to purchase a $169,000 fleet of equipment without a down-payment and at factory cost: "Our dealer Arata Pontiac is selling trucks to Silver State Disposal Co. at his cost" [R. 2523]. Alvin Arata admitted that such a sale was a departure from Arata Pontiac's long established policy [R. 6397-6400].

4. **Adoption by County Commissioners of Procedures That Evaded Competitive Bidding by Giving an Advantage to Clark Sanitation and Placing Other Bidders at a Disadvantage.**

(a) First Award of a Franchise:

From November 17, 1960 to June 20, 1961, Clark Sanitation solicited and instigated the County Commissioners to give a franchise to Clark Sanitation for the exclusive garbage pick-up and disposal service in unincorporated Clark County and for the exclusive use of the County disposal site [R. 1121-268 to 270, 337, 339]. The franchise was awarded August 7, 1961 [R. 1121-306].

(b) Court Action Invalidating Franchise:

On August 16, 1961, Sun Valley filed suit to invalidate the franchise [R. 1121-203 to 216]. On January 17, 1963, the state court rendered a court decision invalidating the franchise that had been awarded on August 7, 1961 to Clark Sanitation [R. 1121-244 to 254]. That decision held as follows: That the procedures adopted by the County Commissioners must comply with NRS 244.187, that the statute requires competitive bidding and that specifications are required which assure competitive bidding [R. 1121-246, 250 to 251]. On April 4, 1963, the state court rendered Findings of Fact, Conclusions of Law and Judgment [R. 1121-255 to 263]. Among its Conclusions of Law, the state court included: "10. An enforceable contract was not entered into between the Board of County Commissioners and Defendant, Clark Sanitation, Inc., because Defendant Clark Sanitation, Inc.'s bid could not be lawfully accepted by the Board, since there was no equal opportunity to bid on a competitive basis." [R.

1121-262]. The judgment was not appealed from; and the conclusions of law were brought to the special attention of the County Commissioners [R. 1121-361].

(c) Second Evasion of Competitive Bidding:

The defendants' agent admitted on March 5, 1965, as follows [R. 1121-391]:

> ". . . (W)e took the city contract with the city ordinance and in it in the proposed ordinance that we furnished this Commission a year ago we took the same rates that were then in existence in the city and in it we suggested about the same I think in that particular matter identical language that we would have the right as well as the county has the right at any period—I think it was every 6 months where the county could review it and reduce or increase the rate and in the event of matters of war, tremendous increase of labor costs, or inflation, and that sort of thing that we would come before the Board upon a written application for a review of the . . . it worked both ways. Increase and decrease as I recall."

LaFortune testified that the defendants transmitted a copy of the City of Las Vegas ordinance to the County Commissioners before the county ordinance was proposed and that he discussed the proposed county ordinance informally with individual County Commissioners [R. 6026-6027]. On April 20, 1964 Ordinance No. 214 was proposed to the County Commissioners, and on June 5, 1964, it was enacted [R. 1121-353 to 359]. The ordinance authorized the County Commissioners to contract for garbage collection and disposal and set out the rates for collection.

hauling and disposal of garbage [R. 1121-354, 356, 357]. LaFortune assumed from the fact that the ordinance established the rates to be charged in the county that the ordinance was preparatory to an invitation to bid for a franchise [R. 6081].

LaFortune admitted that, if the rates to be charged the public had not been predetermined by ordinance and thus removed as a bid variable, Clark Sanitation, Inc. would still have been able to submit a bid, because an experienced operator knows exactly what it costs to pick up an item in any district per person [R. 6197-6198]. However, Ordinance No. 214 in effect told the bidders what the rates would be, so the bid variables would be directed to other factors [R. 6195, 6197].

Subsequently, LaFortune conferred with county representatives on the terms of the proposed franchise [R. 6227, 6229-6230]. On January 25, 1965, the County Commissioners issued the Invitation to Bid, Instructions and Proposed Contracts, which contained blank spaces to be filled in by the bidders [R. 1121-367 to 381]. The County Commissioners invited separate bids for an exclusive franchise with respect to collection and disposal of garbage and for a use permit for the operation and maintenance of a garbage dump, but added that any person or firm may submit bids for both garbage collection and maintenance and operation of the garbage dump and further added that the County Commissioners reserved the right to consider the bids for the franchise and the use permit separately or together, when making its determination as to the granting of the franchise and the use permit [R. 1121-369 to 370].

The proposed contract for the collection and disposal of garbage stated in its pertinent portion [R. 1121-371]:

"1. * * * CONTRACTOR agrees to purchase, contract for the purchase of, or lease, new equipment costing not less than $_____ as the necessity therefor presently exists or may hereafter arise, and/or to make available in connection with the performance and rendition of services herein provided presently owned or leased equipment (more particularly described in the inventory attached hereto) in the estimated value of not less than $.....

"2. * * *

"3. CONTRACTOR shall provide for the payment on a quarterly basis, of a license fee to County based on ..... percent (.) of the gross monthly collections of all the rates, fees, and charges derived from the exercise of the privilege of this franchise. * * *"

The proposed contract for the maintenance and operation of the dumpsite stated in its pertinent portion [R. 1121-37 to 379]:

"1. * * * CONTRACTOR agrees to purchase, contract for the purchase of, or lease, new equipment costing not less than $....., as the necessity therefor presently exists, or may hereafter arise, and/or to make available in connection with the maintenance and operation of said 'dump' or 'dumps' presently owned or leased equipment (more particularly described in the inventory attached hereto) in the estimated value of not less than $.....

"2. * * *

"3. CONTRACTOR shall provide for payment on a quarterly basis of a license fee to County based on ..... percent (....) of the gross monthly revenue derived from whatsoever source and/or connected with the maintenance and operation of said 'dump' or 'dumps'; * * *

* * *

"6. * * * The use of the facility or facilities free of all charges or exaction of payments, shall at all times be made available to any holder of a franchise from the County or any municipality within Clark County for the collection and disposal of garbage or refuse. * * *"

These provisions in the proposed contract bestowed an unfair advantage on Clark Sanitation, Inc. and fettered competition for the following reasons:

75% to 85% of the business of the dumpsite came from the City of Los Vegas franchise holder, dump charges could not be imposed upon the City of Las Vegas franchise holder and the City of Las Vegas franchise holder was a corporate affiliate of Clerk Sanitation, Inc. [R. 1121-385].

The defendants' agent admitted on March 5, 1965, as follows [R. 1121-388]: ". . . (W)e have operated this dumpsite over a period of some 13 years—14 years now, since 1952." As a result, in their bids the defendants represented that they would make available $81,200 worth of presently owned or leased equipment in connection with the operation and maintenance of the dumpsite [R. 1121-378, 383]. By contrast, the plaintiff had no equipment for the operation and maintenance of a

dumpsite for the obvious reason that the only dumpsite in Clark County was operated and maintained by defendants' affiliate [R. 1121-399]. Actually, the bidder, Clark Sanitation, Inc., did not operate or maintain the dumpsite. It was Silver State Disposal, Inc., the corporate affiliate of Clerk Snitation, Inc., which did so; and this operation arose out of an informal agreement with the Board of County Commissioners, because the dumpsite was federal land held by Clark County for use as a public garbage disposal site under a special land use permit until 1962 and thereafter under a 20-year lease [R. 1121-200 to 207, 297 to 300].

The Board of County Commissioners reserved the right to consider the bids for the franchise and the use permit either separately or together, when making its determination as to the granting of the franchise and the use permit [R. 1121-413 to 424]. The award voted by the Board of County Commissioners at the March 5, 1965 meeting was as follows: ". . . (P)ackage deal. Dumpsite and pickup." [R. 1121-392].

(d) Relationship of One or More County Commissioners to Clark Sanitation:

Louis F. La Porta was an insurance agent who was engaged in writing bonds and insurance for the garbage collection and disposal operations conducted by corporations affiliated with the Clark Sanitation during the years 1965 to 1966, inclusive [R. 6170].

William H. Briare, in the course of his private insurance agency business, began writing insurance for corporations affiliated with Clark Sanitation in late 1964 or early 1965 [R. 6028, 6050]. Since he was a County Commissioner elected from the area within the

City of Las Vegas, he claimed in his deposition that he felt that the company which operated the disposal site should have the county business added to its Las Vegas business so that it would not be necessary for that company to seek a city rate increase from the City of Las Vegas in order to finance future operations at the dumpsite cut and fill operation, and he knew that the dumpsite could not charge a company that had a franchise with another municipality, so that he felt the dumpsite and the collection of garbage in Clark County were tied together [R. 1533, 1541-1542, 1545, 1547].

Darwin W. Lamb was engaged in the street sweeping business and in the course of that private business he used equipment of the Clark Sanitation and its affiliated corporations, that is, storage containers for the deposit of trash at the premises swept; and the fact that Clark Sanitation and its affiliated corporations had containers at the hotels and shopping centers was a substantial factor in his vote [R. 1596, 1605-1606, 1609, 1611].

Robert T. Baskin, in the course of his private restaurant business in Las Vegas, used the garbage disposal services of Silver State Disposal and felt that there should only be one garbage collection operator, and Silver State Disposal was an affiliate of Clark Sanitation, and that therefore the franchise should be given to the company whose affiliate had a garbage collection franchise with the City of Las Vegas and whose affiliate operated the disposal site, so that the same company that had the equipment to operate the disposal site also obtained the award of the collection franchise [R. 1496-1501, 1508-1511, 1522-1523].

At the meeting of the County Commissioners at which the franchise was voted, Briare, Lamb and Parkin voted in favor of the award of the franchise to Clark Sanitation, and after the majority vote was cast, La Porta answered: "I would like the record to show that my vote is passed, the purpose being that my agency has represented the client as a broker in a neighboring municipality." [R. 1121-392]. La Porta did not disqualify himself when he voted to adopt Ordinance No. 214, which fixed the rates in advance of the invitation to bid and thus removed rates to the public as a bid variable [R. 848-849].

5. Misrepresentations Made in Clark Sanitation's Proposal for the Exclusive Franchise.

In the Invitation to Bid for the garbage pick-up franchise, the applicant was asked to state what he agreed "to make available in connection with the performance and rendition of services herein provided presently owned or leased equipment (more particularly described in the inventory attached hereto) in the estimated value of not less than $....." [R. 1121-371]. Clark Sanitation listed what purportedly represented "Inventory of Rolling Stock Owned, Operated and/or Leased by Clark Sanitation, Inc., February, 1965" [R. 1121-376]. However, the way Clark Sanitation and its related companies conducted their operations, from time to time a piece of equipment owned by one company would be used for a portion of time in an area of a different company, such as Clark Sanitation, which did not own the equipment [R. 5927-5928]. Thus, intercompany pooling might result in Clark Sanitation using Silver State Disposal equipment as little as 8½% of the

time and yet all of that equipment was listed in the inventory [R. 5928-5930]. Only particular trucks were regularly assigned to a single company's routes [R. 5928-5929]. As a result, it appeared as if Clark Sanitation was operating $327,010.96 of rolling stock in unincorporated Clark County [R. 1121-376]. By contrast, only 25% of the capacity of the defendants' trucks were used in unincorporated Clark County [R. 4727-4728].

In the Invitation to Bid for the dumpsite use permit, the applicant was asked to state what he agreed "to make available in connection with the maintenance and operation of said 'dump' or 'dumps' presently owned or leased equipment (more particularly described in the inventory attached hereto) in the estimated value of not less than $....." [R. 1121-378]. Clark Sanitation represented its presently owned or leased equipment to be valued at $81,200 and furnished an inventory of dumpsite equipment [R. 1121-383]. In truth, Clark Sanitation never operated and never had an item of dumpsite equipment, for it was Silver State Disposal that operated the dumpsite [R. 1121-70, 71, 84]. Indeed, in their financial statements for the year ending September 30, 1965, the defendants admitted: "On April 1, 1965, a franchise to operate the dump was issued by the Clark County Commission to Clark Sanitation, Inc. The dump equipment was purchased from Silver State Disposal Service, Inc. which had operated the dump prior to April 1, 1965." [R. 1121-169].

On March 11, 1965, six days after the award of the franchise, Clark Sanitation sent to Sun Valley's customers a printed form letter, stating that on March 5,

1965, the Board of County Commissioners did award the exclusive contract to Clark Sanitation and soliciting not only the pick-up account, but also a container rental account [R. 1121-35].

SPECIFICATION OF ERRORS.

The District Court committed prejudicial error in granting the defendants' motion for summary judgment for the following reasons:

1. There was a genuine factual issue whether container leasing was a line of interstate commerce on which the trade practices complained of had an effect.

2. There was a genuine factual issue whether the defendants conducted an interstate business which was benefited by the trade practices complained of, and the accrual of an advantage by an interstate business conducted by the defendants meets the test of "affecting interstate commerce" even if the plaintiff does not directly engage in trade across state lines.

3. There was a genuine factual issue whether the defendants had established a customer relationship with the distributor of a particular garbage pick-up equipment manufacturer of such a nature that interstate commerce in equipment distribution was affected by the trade practices complained of.

4. There was a genuine factual issue whether defendants carried out an anticompetitive scheme through trade practices a part of which grew out of proceedings before the County Commissioners on the subject of an exclusive franchise for garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada.

5. Misrepresentations in a bid for an exclusive franchise resulting in the rejection of competing bids and the issuance of the franchise and the subsequent use of the fruits of such conduct for the purpose of excluding competition may, in total, be found to constitute part of a broader scheme violative of the antitrust laws without an attack on the franchise.

6. There was a genuine factual issue whether the procedures adopted by the county commissioners destroyed the free competition on a common basis the state statute demanded, and a franchise granted in violation of the statutory requirement would be action beyond the outer perimeter of statutory authority and therefore without immunity from the antitrust laws.

7. There was a genuine factual issue whether the invitation for bids was a sham that evaded the free competition on a common basis state statute demanded, and a franchise granted in violation of the statutory requirements would be action beyond the outer perimeter of statutory authority and therefore without immunity from the antitrust laws.

8. There was a genuine factual issue whether the grant of a franchise was influenced in furtherance of an anticompetitive conspiracy participated in by one or more County Commissioners, and such conspiratorial conduct would be subject to the antitrust laws.

SUMMARY OF THE ARGUMENT.

The evidence before the court below presented a triable issue of fact whether the defendants engaged in practices amounting to the removal of independents so as to keep them from having a depressive influence on county wide container rental rates and to enable the defendants to gain control of the container rental rate structure in Clark County, Nevada. An inference could be reasonably drawn from the evidence that the container rental activity was a separate sub-market in a line of interstate commerce in which the litigants participated and that the flow of interstate commerce continued until the containers reached the customers of the garbage pick-up and disposal service. There was a genuine triable issue whether the trade practices complained of were in restraint of interstate commerce.

The evidence before the court below presented a triable issue whether the defendants conducted an interstate business that inevitably had to be strengthened by the removal of the independents in Clark County, Nevada. The broad test of "affecting interstate commerce" within the meaning of the Sherman Act is met if a defnedant's anticompetitive trade practices gave it a definite advantage in its own interstate dealings. It is not essential to satisfy the jurisdictional scope of the antitrust laws that the plaintiff directly engage in trade across state lines.

The evidence before the court below showed that the fact-finder could infer the existence of a favored reciprocal relationship between the defendants and an interstate distributer of garbage pick-up equipment which competed with other products in interstate commerce.

Inevitably the removal of independents from Clark County, Nevada, would leave the defendants as the sole outlet for hundreds of thousands of dollars worth of equipment and would thus make it more difficult for competing brands of equipment not distributed or favored by the said distributor to find outlets in Clark County, Nevada.

The fact-finder must look at the whole picture, not merely each of the specific trade practices. Collective consideration of the defendants' trade practices shows that there was a genuine factual issue whether the defendants carried out an anticompetitive scheme through their trade practices, a part of which grew out of the proceedings before the County Commissioners on the subject of an exclusive franchise for garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada.

The evidence before the court below showed that deliberate overstatements amounting to fraud were made in Clark Sanitation's proposal for the exclusive franchise for the garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada. The court below recognized that there was inferential support in the evidence for a finding of misrepresentation. It erroneously concluded that the franchise must be attacked. However, the right to conduct the garbage disposal business in the unincorporated area of Clark County, Nevada, and the right to competitively bid for the franchise was a common right. It was in an economic framework that the bids were to be submitted and considered. The restriction of that right in the case at bar was effectuated by fraud. The public has a paramount interest in seeing that a restriction

of a common right springs from a background free from fraud. An attack on the franchise is unnecessary. The County Commissioners did not pass on the true situation, because the facts had been withheld pursuant to an anticompetitive scheme. The misrepresentations and the subsequent use of the fruits of such conduct for the purpose of excluding competition may, in total, be found to constitute part of a broader scheme violative of the antitrust laws without an attack on the franchise.

There was evidence before the court below that the procedures adopted for the award of the franchise were illegal. The plaintiff has a primary right not to have its business injured by a pattern of conduct violative of the Sherman Act. Where the plaintiff's damages result from a pattern of conduct unlawful but for a defendant's contention that its conduct was state-directed, the plaintiff has a right to show that the injurious conduct was carried out in excess of statutory authority. A federal court whose jurisdiction has been invoked under the antitrust laws has a duty to decide questions of state law when necessary to the rendition of a judgment. In the case at bar, there was a genuine factual issue remaining for trial whether the procedures referred to by the court below as illegal in practical effect destroyed the free competition on a common basis which the statute demanded. The bid documents and the variables and conditions of bidding were tailored to handicap bidders other than Clark Sanitation. In Nevada, violation of a statutory requirement of competitive bidding is action beyond the outer perimeter of authority. The state court of Nevada has held that the governing state statute requires competitive bidding as

the method by which the County Commissioners must proceed to grant a franchise.

There was evidence that, not only was the competitive bidding required by the state statute destroyed, but that one or more of the County Commissioners favored Clark Sanitation for personal selfish reasons unrelated to the public interest. There was a trial question whether the invitation for bids was a sham, done only to appear to comply with the law and to clothe the proceedings with the habiliments of legality. A conclusion that the proceeding before the County Commissioners was a subterfuge to evade competitive bidding would subject the franchise to attack in a private antitrust action. The County Commissioners would not have the power to decide whether their invitation for bids was a sham.

The same inferential proof that supports a genuine triable issue whether the invitation for bids was a sham and whether one or more County Commissioners favored Clark Sanitation for personal selfish reasons unrelated to the public interest permits the fact-finder to conclude that one or more County Commissioners joined an anticompetitive scheme and in furtherance thereof influenced the grant of the franchise. Such conspiratorial conduct would be subject to the antitrust laws.

ARGUMENT.

I.

THERE WAS A GENUINE FACTUAL ISSUE WHETHER CONTAINER LEASING WAS A LINE OF INTERSTATE COMMERCE ON WHICH THE TRADE PRACTICES COMPLAINED OF HAD AN EFFECT.

"(T)he question whether summary judgment is appropriate in any case is one to be decided upon the particular facts of that case." *First National Bank of Arizona v. Cities Service Co.*, 88 S. Ct. 1575, 1577 (1968).

In *American Mfrs. M. I. Co. v. American Broadcasting-Para. Th.*, (2 Cir. 1967) 388 F. 2d 272, 280-282, the issue was whether a group of television stations was a single "product" or different "products" for the purpose of determining whether a network made a tie-in sale, which requires separate tying and tied products. It was held that the evidentiary facts permitted different inferences to be drawn on the question of separability and that a summary judgment must therefore be reversed, since *United States v. Diebold*, 269 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962), dictates conformity to the principle that, "(o)n summary judgment the inferences to be drawn from the underlying facts contained in such materials (affidavits, exhibits and depositions) must be viewed in the light most favorable to the party opposing the motion."

The court added, 388 F. 2d at 279-280:

> "Moreover, we have been forewarned that the use of summary judgment in complex antitrust litigation must be closely scrutinized. Poller v. Columbia Broadcasting System, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). And,

this admonition is apt where too little is known of the practical impact of the challenged transactions. White Motor Co. v. United States, 372 U.S. 253, 263-264, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963). But, this is not to say that summary judgment never has a place in the antitrust field. (citations)

"The question before us is not the availability of the rule in any specific category of cases, but whether the record in this particular case adequately clarifies the complex and convoluted issues that are so common in antitrust litigation.

Thus, our holding here does not weaken the force of Rule 56, but 'simply recognize(s) that there are instances where summary judgment is too blunt a weapon with which to win the day, particularly where so many complicated issues of fact must be resolved in order to deal adequately with difficult questions of law which remain in the case.' Miller v. General Outdoor Advertising Co., 337 F.2d 944 (2d Cir.1964)."

In *Southern Blowpipe & Roofing Co. v. Chattonooga Gas Co.,* (6 Cir. 1966) 360 F. 2d 79, a summary judgment was reversed in an antitrust case involving the question whether a utility already possessed of a legal monopoly which, in the service of that monopoly, avails itself of the peculiarities of utility rate-making to sell below cost in the competitive field of selling appliances may be found to have violated the antitrust laws. The court stated, 360 F. 2d at 81:

"Notwithstanding the salutary and timesaving uses of summary judgment, Judge Miller of this Court took occasion to speak at some length of

the restraints that should be observed in its use. S. J. Groves & Sons Co. v. Ohio Turnpike Commission, 315 F.2d 235, 237 (CA 6, 1963). Sparing employment of it in the complex field of the antitrust statutes was admonished by the Supreme Court in Poller v. Columbia Broadcasting Co., 368 U.S. 464, 467, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962) and White Motor Co. v. United States, 372 U.S. 253, 259-264, 83 S.Ct. 696 (1963)."

See *Tillamook Cheese & Dairy Association v. Tillamook County Creamery Association*, (9 Cir. 1966) 358 F. 2d 115, 117.

The plaintiff's evidence was sufficient to justify a finding by the jury that the defendants engaged in practices amounting to the removal of independents so as to keep them from having a depressive influence on county-wide container rental rates and to enable the defendants to gain control of the container rental rate structure in Clark County, Nevada. Such a finding may be inferred from the evidence set out in Paragraph D(1) of the Statement of Facts, *supra*. Thus we are left with the question whether such activities by defendants were in restraint of interstate commerce and whether the court below erroneously withdrew that question from the jury by granting a summary judgment.

A. An Inference May Be Drawn That the Container Rental Activity Was a Separate Sub-Market.

Utilities engage in merchandising activity. *Re Promotional Activities by Gas & Elec. Corporations*, (N.Y. P.S.C. 1967) 68 PUR 3d 162. A utility may conduct an appliance rental program that is a separate and dis-

tinct operation. *Re Intermountain Gas Co.,* (Idaho P.S.C. 1967) 67 PUR 3d 511. A utility may engage in trade practices affecting an appliance market in a line of interstate commerce that conflict with the Sherman antitrust laws. *Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co., supra,* 360 F. 2d at 81. A pragmatic approach to the merchandising activities of companies which perform a local garbage pick-up and disposal service leads to the inevitable conclusion that the court below failed to pierce economic realities, when it stated that interstate commerce, in the acquisition of equipment and supplies for the garbage collector, was incidentally involved [R. 1098]. The court below has misplaced its reliance on *Page v. Works,* (9 Cir. 1961) 290 F. 2d 323, cert. denied, 368 U.S. 875, 82 S. Ct. 121, 7 L. Ed. 2d 76 (1961), because an evaluation of business facts shows that this decision is not controlling. A motion for summary judgment cannot be determined by showing what another court did or did not decide on a different set of facts and on a different evidentiary showing.

The evidentiary facts recited in Paragraph D(1)(a) of the Statement of Facts, *supra,* are incorporated herein by reference. A fact-finder may readily infer that the container rental activity was a separate and distinct operation; it was conducted on a mass scale by Disposal Investments, Inc., whose investment, revenue and expenses were separately accounted for; its rental rates were not regulated by any governmental body; its profitability was stated by the defendants in their financial reports to be enormous; its rate structure was subject to the depressive influence of the rates charged by independents. Clearly, it is unrealistic to say as a

matter of law that the container rental activity was not viewed as a merchandising activity. The costs of operation of container leasing was not treated as an item of expense for supplies of the garbage pick-up operation. Rental income was not merged with pick-up revenue for rate-making purposes in territories where an affiliate of the defendant had a franchise. The very fact that defendant Disposal Investments, Inc. sought a separate container franchise from the City of Las Vegas reveals that it was a distinct merchandising activity [R. 830, *822-827*]. If it merely involved supplies to a garbage collection service and Silver State Disposal had an exclusive contract in the City of Las Vegas for garbage pick-up and disposal service, why would Disposal Investments, Inc. have applied to the City of Las Vegas for a container franchise? Surely, the court below erred in depriving the fact-finder of the opportunity to consider container rental activity, not as the mere incidental furnishing of supplies for garbage collection, but as a separate form of merchandising. Both plaintiff and defendants engaged in container rental activity. "(T)here may be submarkets that are separate economic entities." *United States v. Grinnell Corp.*, 384 U.S. 563, 572, 86 S. Ct. 1698, 16 L. Ed. 2d 778, 787 (1966); *Bailey's Bakery, Ltd. v. Continental Baking Company*, (D. Hawaii 1964) 235 F. Supp. 705, 715.

The defendants herein conducted their container rental activity as a separate and distinct operation. They used Disposal Investments, Inc., a separate corporation, for that purpose. They maintained separate books of account and engaged in the container leasing business throughout Clark County, Nevada [R. 176, 181, 4842]. Disposal Investments had the advantage of available

customers in the cities of Las Vegas and North Las Vegas, where it had exclusive contracts for garbage pick-up and disposal service [R. 4882]. However, Disposal Investments' rental rates in the City of Las Vegas, City of North Las Vegas and unincorporated Clark County were not regulated by any government body [R. 4838]. In unincorporated Clark County, Sun Valley was a competitor not only in garbage pick-up and disposal service, but also container rentals [R. 842-843, 4720]. The rates charged in unincorporated Clark County influenced the rates charged in the City of Las Vegas [R. 4719, 4720].

Disposal Investments had a number of large customers who owned and managed apartment house properties in both the City of Las Vegas and unincorporated Clark County [R. 4893-4894, 4899-4900]. The apartment house customers were billed separately for container rentals [R. 4905-4906]. Disposal Investments could not charge a lower container rental in unincorporated Clark County than in the City of Las Vegas and so its policy was to maintain a uniform container rental rate in both territories [R. 4901-4902]. Rates charged to customers in the City of Las Vegas were influenced by the rates charged to customers in unincorporated Clark County [R. 4720]. Sun Valley Disposal Co. was viewed by the defendants a potential price-cutter [R. 4714-4715]. Sun Valley took about 1,000 apartment house accounts from the defendants [R. 4720]. The defendants claim that they could not reduce prices in the unincorporated Clark County because that might result in customers demanding a reduction in the City of Las Vegas [R. 4719]. See *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 219-220, 60 S. Ct. 811, 842, 84 L. Ed. 1129 (1940).

B. An Inference May Be Drawn That the Flow of Interstate Commerce Continued Until the Containers Reached the Customers of the Garbage Pick-up and Disposal Service.

The plaintiff contends that the course of conduct complained of herein operated upon the containers while they were still in the flow of interstate commerce, which did not terminate until the containers reached the customers down the distribution line.

In *Las Vegas Merchant Plumbers Ass'n. v. United States*, (9 Cir. 1954) 210 F. 2d 732, 743, cert. denied, 348 U.S. 817, 75 S. Ct. 29, 99 L. Ed. 645 (1954), it was held that a case under the antitrust laws, so far as the interstate commerce element is concerned, may rest on the theory that the acts complained of occurred within the flow of interestate commerce. This is generally referred to as the "in commerce" theory. In that case there was evidence that goods were shipped to the wholesaler to fill special orders placed with him by the conspiring plumbers. Goods were also shipped by the manufacturers to the conspiring plumbers on direct order. Still other goods were shipped to the wholesaler for general resale. The court found the evidence sufficient to support the "in commerce" theory.

See *Independent Taxicab Operator's Ass'n v. Yellow Cab Co.*, (N.D. Cal. 1968) 278 F. Supp. 979, 984; *United States v. Pennsylvania Refuse Removal Association*, (3 Cir. 1966) 357 F. 2d 800, 808, cert. denied, 384 U.S. 961, 86 S. Ct. 1588, 16 L. Ed. 2d 674 (1966).

In *Standard Oil Co. v. F.T.C.*, 340 U.S. 231, 71 S. Ct. 240, 95 L. Ed. 239 (1951), it was held that gasoline retained its "in commerce" character after it was shipped from Indiana to Detroit and was stored to

await wintertime sale, where Standard could accurately estimate the demands of its customers.

See *City of Fort Lauderdale v. East Coast Asphalt Corp.*, (5 Cir. 1964) 329 F. 2d 868, 870-871; *Foremost Dairies, Inc. v. F.T.C.*, (5 Cir. 1965) 348 F. 2d 674, 677-678.

Walling v. Jacksonville Paper Company, 317 U.S. 564, 63 S. Ct. 332, 87 L. Ed. 460 (1943), was a Fair Labor Standards Act case which held that in three categories the special circumstances under which goods moving from out of state to an instate wholesaler for redistribution in the state may be said to have the requisite practical continuity of an interstate movement. Included are goods purchased by wholesalers (1) to fill a special order, (2) under a contract or understanding by which the wholesaler has agreed to fill the needs of a particular customer, or (3) to fill the anticipated needs of a particular customer although no contract or understanding to do so exists. For a discussion of the application of the *Walling* case to cases arising under the Sherman Act, see *Burke v. Ford*, (10 Cir. 1967) 377 F. 2d 901, 904, reversed on other grounds, 389 U.S. 320, 88 S. Ct. 443, 19 L. Ed. 2d 554 (1967).

A combination creating a monopoly or removing independents from the market so as to indirectly fix prices is "illegal per se". *United States v. General Motors Corporation*, 384 U.S. 127, 148, 86 S. Ct. 1321, 1332, 16 L. Ed. 2d 415, 428 (1966); *United States v. Aluminum Co. of America*, (2 Cir. 1945) 148 F. 2d 416, 427-428.

The amount of commerce involved is not material, especially where it clearly exceeds *de minimis*. *Safeway Stores, Incorporated v. F.T.C.*, (9 Cir. 1966) 366 F.

2d 795, 798; *Perryton Wholesale, Inc. v. Pioneer Distributing Co. of Kansas*, (10 Cir. 1965) 353 F. 2d 618, 622; *Apex Hosiery v. Leader*, 310 U.S. 469, 485, 60 S. Ct. 982, 987, 84 L. Ed. 1311 (1940); *United States v. Socony-Vacuum Oil Co., supra*, 310 U.S. at note 59, page 224, 60 S. Ct. at note 59, page 846, 84 L. Ed. at note 59, page 1168; *United States v. Yellow Cab Co.*, 332 U.S. 218, 225, 67 S. Ct. 1560, 1564, 91 L. Ed. 2010 (1947).

The periodic replacement of equipment has been held to be the subject of recurrent interstate commerce. *United States v. Yellow Cab Co., supra*, 332 U.S. at 225, 67 S. Ct. at 1564, 91 L. Ed. at 2017.

II.

THERE WAS A GENUINE FACTUAL ISSUE WHETHER THE DEFENDANTS CONDUCTED AN INTERSTATE BUSINESS WHICH WAS BENEFITED BY THE TRADE PRACTICES COMPLAINED OF, AND THE ACCRUAL OF AN ADVANTAGE BY AN INTERSTATE BUSINESS CONDUCTED BY THE DEFENDANTS MEETS THE TEST OF "AFFECTING INTERSTATE COMMERCE" EVEN IF THE PLAINTIFF DOES NOT DIRECTLY ENGAGE IN TRADE ACROSS STATE LINES.

A. An Inference May Be Drawn That the Defendants Conducted an Interstate Business.

In *Stauffer v. Exley*, (9 Cir. 1950) 184 F. 2d 962, 966-967, it is stated:

> "The trial court found that appellants 'are engaged in interstate commerce'. The complaint alleges that appellants have developed a special apparatus and method for giving therapeutic treat-

ments of passive exercise which they advertise in California and other states as 'Stauffer' treatments and 'Stauffer System' treatments. Appellants operate a place of business in Los Angeles where such treatments are rendered to the public and have licensed other places of business, both in California and other states, where such treatments are rendered under appellants' supervision and control as to nature and quality. Appellants train the operators of the licensed places of business in the method of rendering the treatments and provide the necessary special apparatus. All the licensed businesses use the trade name, 'Stauffer', with the express consent of appellants. U. S. v. South-Eastern Underwriters Ass'n., 1944, 322 U.S. 533, 550, 64 S.Ct. 1162, 88 L.Ed. 1140."

Appellant incorporates herein by reference Paragraph D(2) of the Statement of Facts, *supra,* to show that defendants conducted an interstate business that inevitably had to be strengthened by the removal of the independents in Clark County, Nevada.

B. The Broad Test of "Affecting Interstate Commerce" Is Met if a Defendant's Anticompetitive Trade Practices Give It a Definite Advantage in Its Own Interstate Dealings.

In *Rangen, Inc. v. Sterling Nelson & Sons, Inc.,* (9 Cir. 1965) 351 F. 2d 851, the question was whether commercial bribery by a defendant occurred "in the course of (its own) interstate commerce" within the meaning of Section 2(c) of the Clayton Act, 15 U.S.C.A. § 13(c). It was shown that the commercial bribery, though local in character, enabled the defendant

to have stronger competitive capacity in its interstate business; and the Court stated, 351 F. 2d at 861:

> ". . . (T)he payments to Grimes were made in the course of interstate commerce because they created influences intrastate which injured the free competitive interstate commerce in fish food outside Idaho. The concept to which we refer is something more than the broader test of 'affecting interstate commerce', which is applied under the Sherman Act. Critical here is the fact that Rangen's payments to Grimes gave it a definite advantage in its own interstate dealings—the 'beneficiary' was its interstate business—and therefore the payments must be regarded as having been made in the course of its own interstate commerce."

Since the Sherman Act standard "affecting interstate commerce" is conceded by the language of the decision to be broader in scope than the Robinson-Patman's requirement that the violation of its terms occur "in" commerce, it logically follows that the jurisdictional requirements of the Sherman Act are met if it can be shown that a defendant derived a definite advantage in its own interstate dealings.

C. The Plaintiff Does Not Have to Directly Engage in Trade Across State Lines.

The Ninth Circuit in *Page v. Work*, *supra*, 290 F. 2d at 330, stated that the crucial test for a private antitrust litigant was: ". . . not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." However, the principle that a private litigant must prove an effect on the

interstate aspect of his business was departed from in *Washington State Bowling Prop. Ass'n v. Pacific Lanes, Inc.*, (9 Cir. 1966) 356 F. 2d 371, 379, in which the appellate court stated that jurisdiction could be upheld on two alternative grounds:

> "* * * In this case the district court submitted two special interrogatories to the jury on the question of interstate commerce; one asking whether the acts of the defendants had substantially affected the interstate commerce portion of the plaintiff's business in an amount that was more than insignificant (Int. No. 3; C. T. 223), and another asking whether the acts of defendants substantially affected interstate commerce and that the amount of commerce affected was not insignificant (Int. No. 4; C. T. 223). A 'yes' answer to either would be adequate to sustain a finding of jurisdiction in the district court for the whole case. The jury answered 'yes' to both interrogatories."

In *Washington State Bowling Prop. Ass'n v. Pacific Lanes, Inc., supra,* 356 F. 2d at 379, reference is made to Eiger, Commerce Element in Federal Antitrust Litigation, 25 Fed. B. J. 282, 293 (1965). That article criticized *Page v. Work, supra,* as incompatible with the United States Supreme Court decision in *Klor's Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959). The article stated, 25 Fed. B. J. at 296-297:

> "The essence of Klor's is that private plaintiffs ought not to be burdened with proving the effects of a per se offense which, in a Government action, exist, as a matter of law, from the fact of the violation. The policy expressed in *Klor's* appears to require that the same jurisdictional test be

applied to Government and private actions. Congress wrote the treble damage action into the antitrust laws in part as an instrument of enforcement, and it is inconsistent with that objective to impose upon a private suitor a burden not demanded of the Government.

"With *Klor's* and *Page* in mind, note the holding in *Gardella v. Chandler*. The plaintiff, a baseball player, had been barred from the sport by both major leagues. Baseball itself had previously been specifically held by the Supreme Court to be a local activity. This fact notwithstanding, two judges found an effect on interstate television and radio broadcasts of the games and the interstate movement of baseball equipment. Judge Hand was of the opinion that baseball was only *pro tanto* subject to the antitrust laws to the extent of its association with related interstate businesses. Judge Frank, however, refused to accept even this limitation, holding that, so long as there was a relationship with commerce of more than a *de minimus quantum*, the entire industry fell within the purview of the act.

"As the earlier discussion indicates, Sherman Act jurisdiction is defined by the relationship between the violation and interstate commerce. If the *Klor's* thesis is to be given full effect, the commerce determination surely cannot be grounded upon the identity of the plaintiff, or whether the illegal acts affect the interstate commerce phase of the plaintiff's business. The test is whether unlawful activity affects the ability of the business to participate in interstate trade, either as a producer

or distributor of goods moving in commerce or as the local recipient of related goods from other states. Just as there is a danger of extending the concept of commerce to embrace every conceivable violation no matter how local, so, on the other hand, the *Page* decision, if carried to its logical extreme, would virtually repeal the statute which makes treble damage remedy available to '(a)ny person' injured by an antitrust violation. By requiring that the plaintiff prove an effect on the interstate aspect of his business, *Page* in effect denies relief to a businessman who either does not directly engage in trade across state lines or cannot claim direct injury to such trade. The specific conduct which injured the plaintiff may itself have been purely local, but the local nature of the violation does not immunize it if prior or later interstate trust in goods is affected.

"The application of the *Klor's* principle to commerce problems would not relieve a private litigant of the duty to allege and prove facts which establish a basis for his suit. It would, however, however, put him on the same footing as the Government. Thus, for example, purely personal services for customers after they have ended a journey across state lines would be without the Act in either Government or private suit. On the other hand, a manufacturer's conduct which forces a local dealer to illegally maintain prices affects the flow of commerce in the particular goods, and that effects is not diminished nor is it less significant to antitrust enforcement because a retailer-purchaser, rather than the Government, seeks relief

under the Act. Similarly, if a local builder of homes who does no interstate business at all is victimized by a price fix of the *Las Vegas* or *Employing Plasterers* variety, he should not be barred from Sherman Act relief. However, even *Page* theory which requires injury to the interstate aspect of the plaintiff's business, the builder would be barred from recovery because he has no interstate business. The *Page* thesis has run into opposition in at least two district courts, one of them the Ninth Circuit. In *A. B. T. Sightseeing Tours, Inc. et al v. Gray Line New York Transportation Corp.*, the Court held that because New York City sightseeing companies purchase substantial amounts of equipment and solicit business from out of state, a violation could affect commerce as alleged in the complaint. In *Cathay Mortuary-Wah Sang v. Funeral Directors of San Francisco, Inc.*, the movement of funeral equipment from outside California to a local funeral parlor was held sufficient to satisfy the Sherman Act in a private suit charging exclusion from a local funeral directors association. Interestingly enough, the District Court cited the decisions in *Las Vegas* and *Northern California Pharmaceutical* (both Government suits) and ignored *Page*.

"If consistency in antitrust enforcement is a desirable objective, commerce in a private action should rest upon the relationship between the unlawful conduct and the movement of the goods across state lines, without regard to whether the plaintiff is the Government or a private party."

In *Utah Gas Pipelines Corp. v. El Paso Natural Gas Co.,* (D. Utah 1964) 233 F. Supp. 955, 961, it is stated:

> "* * * The Congressional intent is broad enough to cover the local entrepreneur opposed by interstate combinations conspiring to preserve their existing market positions and accomplish future market encroachments. While in Mead's, the more limited reach of the Robinson-Patman Act was involved, in the Sherman Act Congress left no area of its constitutional power over interstate commerce unoccupied, United States v. Frankfort Distilleries, 324 U.S. 293, 65 S. Ct. 661, 89 L. Ed. 951 (1945). Intrastate activities may apply the pinch illegally upon interstate commerce. United States v. Women's Sportswear Mfg. Ass'n., 336 U.S. 460, 69 S. Ct. 714, 93 L. Ed. 805 (1949). And victims in a position to complain of interstate monopolies or conspiracies are not limited to those conducting wide scale activities. Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)."

III.

THERE WAS A GENUINE FACTUAL ISSUE WHETHER THE DEFENDANTS HAD ESTABLISHED A CUSTOMER RELATIONSHIP WITH A DISTRIBUTOR OF A PARTICULAR GARBAGE PICK-UP EQUIPMENT MANUFACTURER OF SUCH A NATURE THAT INTERSTATE COMMERCE IN EQUIPMENT DISTRIBUTION WAS AFFECTED BY THE TRADE PRACTICES COMPLAINED OF.

Appellant incorporates herein by reference Paragraph D (3) of the Statement of Facts, *supra,* to show the evidentiary facts pertaining to the customer relationship between defendant and Arata Pontiac, as a distributor of Leach equipment, a product in competition with other products in interstate commerce. The inference

may be drawn that a favored relationship reciprocal in character existed between them. Inevitably the removal of independents from Clark County, Nevada, would leave the defendants as the sole outlet for hundreds of thousands of dollars worth of equipment and would thus make it more difficult for competing brands of equipment not distributed or favored by Arata Pontiac to find outlets in the Clark County, Nevada, market.

In *Burke v. Ford*, 389 U.S. 320, 88 S. Ct. 443, 444, 19 L. Ed. 2d 554 (1967), it is stated:

> "The Court of Appeals held that proof of a state-wide wholesalers' market division in the distribution of good retained in substantial volume within the State but produced entirely out of the State was not by itself sufficient proof of an effect on interstate commerce. We disagree. Horizontal territorial divisions almost invariably reduce competition among the participants. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136; United States v. Sealy, Inc., 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238. When competition is reduced, prices increase and unit sales decrease. The wholesalers' territorial division here almost surely resulted in fewer sales to retailars—hence fewer purchases from out-of-state distillers—than would have occurred had free competition prevailed among the wholesalers. In addition the wholesalers' division of brands meant fewer wholesale outlets available to any one out-of-state distiller. Thus the state-wide wholesalers' market division inevitably affected interstate commerce."

Wholly intracounty acts may be found to have had a substantial effect on interstate commerce. *Bank of Utah v. Commercial Security Bank,* (10 Cir. 1966) 369 F. 2d 19, 23.

See: *Otto Milk Company v. United Dairy Farmers Coop. Ass'n,* (3 Cir. 1967) 388 F. 2d 789, 798.

IV.

THERE WAS A GENUINE FACTUAL ISSUE WHETHER DEFENDANTS CARRIED OUT AN ANTI-COMPETITIVE SCHEME THROUGH TRADE PRACTICES, A PART OF WHICH GREW OUT OF PROCEEDINGS BEFORE THE COUNTY COMMISSIONERS ON THE SUBJECT OF AN EXCLUSIVE FRANCHISE FOR GARBAGE PICK-UP AND DISPOSAL SERVICE IN THE UNINCORPORATED AREA OF CLARK COUNTY, NEVADA.

The standard to be applied on a motion for summary judgment is analogous to that used on a motion for a directed verdict. *American Mfrs. M. I. Co. v. American Broadcasting-Para. Th., supra,* 388 F. 2d at 279.

This Circuit has reversed a directed verdict on the issue of intent to monopolize, even though the proof as to each of specific acts may be insufficient in itself to establish unlawful intent, because this Circuit recognized that "the jury must look at the 'whole picture', weigh the contradictory evidence and inferences and draw the 'ultimate conclusion as to the facts'." *Case-Swayne Co. v. Sunkist Growers, Inc.,* (9 Cir. 1966) 369 F. 2d 449, 459, reversed on other grounds, 389 U.S. 384, 88 S. Ct. 528, 19 L. Ed. 2d 621 (1967); see *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.,* (8 Cir. 1966) 368 F. 2d 679, 691.

The practices of the defendants must be considered collectively in conformity with the dictates of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777, 784 (1962).

The plaintiff in the case at bar can rely upon the collective consideration of the following acts and practices: Early attitude of hostility toward independents, *American Medical Ass'n v. United States*, 76 App. D.C. 70, 87, 130 F. 2d 233, 250 (1942), aff'd, 317 U.S. 519, 63 S. Ct. 326, 317 U.S. 519 (certiorari limited to other issues); acquisitions accompanied by covenants against competition prior to the entry of Sun Valley into business, *Bausch Machine Tool Co. v. Aluminum Co.* (2 Cir. 1934) 72 F. 2d 236, 239-240; existence of the scheme before the entry of Sun Valley into business, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, *supra*, 370 U.S. at 709-710; persistent unprofitable sales below cost, *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696, Fn. 12, 87 S. Ct. 1326, 1332-1333, Fn. 2, 18 L. Ed. 2d 406 (1967); the use of "deep pocket" financial power based on a monopoly, *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, *supra*, 368 F. 2d at 691; unjustified territorial price reduction, *Utah Pie Co. v. Continental Baking Co.*, *supra*, 386 U.S. at 694, 87 S. Ct. at 1332; the use of unreliable accounting records, *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, *supra*, 368 F. 2d at 691; expectation of reciprocal favored treatment, *Milgram v. Loew's, Inc.*, (3 Cir.) 192 F. 2d 579, 585, cert. denied, 343 U.S. 929; use of lawful monopoly power to create monopoly power in a separate but related field in which a monopolistic regulated industry is not the state policy, *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting Inc.*, (5 Cir. 1966) 365 F. 2d 478, 483.

The appellant incorporates herein by reference Paragraph D (1)(d) and (e) of the Statement of Facts, *supra,* which recites evidentiary support for the conclusion that the defendants carried out an anticompetitive scheme through trade practices, a part of which grew out of proceedings before the County Commissioners on the subject of an exclusive franchise for garbage pick-up and disposal in the unincorporated area of Clark County, Nevada.

The District Court erroneously disregarded the injurious impact of the defendants' private commercial activities without reference to the proceedings conducted by the County Commissioners on the subject of the exclusive franchise for a garbage pick-up and disposal service in the unincorporated area of Clark County. *Woods Exploration & Pro. Co. v. Aluminum Co. of America,* (S.D. Tex. 1963) 36 F.R.D. 107, 112.

V.

MISREPRESENTATIONS IN A BID FOR AN EXCLUSIVE FRANCHISE RESULTING IN THE REJECTION OF COMPETING BIDS AND THE ISSUANCE OF THE FRANCHISE AND THE SUBSEQUENT USE OF THE FRUITS OF SUCH CONDUCT FOR THE PURPOSE OF EXCLUDING COMPETITION MAY, IN TOTAL, BE FOUND TO CONSTITUTE PART OF A BROADER SCHEME VIOLATIVE OF THE ANTITRUST LAWS WITHOUT AN ATTACK ON THE FRANCHISE.

The court below held that one of the plaintiff's claims which finds inferential support in the evidence is that misrepresentations were made in Clark Sanitation's proposal for the exclusive franchise for the garbage pick-up and disposal service in the unincorporated area of

Clark County, Nevada [R. 1094]. The evidentiary facts are set forth in Paragraph D (5) of the Statement of Facts, *supra*. A deliberate overstatement is fraud on the government body. *United States v. Neifert-White Co.*, ... U.S. ....., 88 S. Ct. 959, 19 L. Ed. 2d 1061 (1968). The court below also held that the ultimate award of the franchise to Clark Sanitation is what enabled the defendants to gain monopolistic control of the garbage disposal business in the unincorporated area of Clark County [R. 1095].

The evidence shows that on March 11, 1965, six days after the award of the franchise, Clark Sanitation sent to Sun Valley's customers a printed form letter, stating that on March 5, 1965 the Board of County Commissioners did award the exclusive contract to Clark Sanitation and soliciting not only the pick-up account, but also a container rental account [R. 1121-35].

The court below concluded that, if the franchise was unlawfully granted, the remedy is to attack the franchise [R. 1098]. In that last conclusion, the District Court fell into basic error, viewed against the legal standard that misrepresentations in a bid for an exclusive franchise resulting in the rejection of competing bids and the issuance of the franchise and the subsequent use of the fruits of such conduct for the purpose of excluding competition may, in total, be found to constitute part of a broader scheme violative of the antitrust laws without an attack on the franchise

The right to conduct the garbage disposal business in the unincorporated area of Clark County, Nevada, and the right to competitively bid for the franchise was a common right of all citizens prior to the award of an

exclusive franchise by the County Commissioners. Bids were to be submitted and considered in an economic framework. A restriction of that common right was effectuated by fraud. The public has a paramount interest in seeing that a restriction of a common right springs from a background free from fraud.

In *Woods Exploration & P. Co. v. Aluminum Co. of America,* (S.D. Tex. 1963) 36 F.R.D. 107, and *Woods Exploration & P. Co. v. Aluminum Co. of America,* (Tex. 1964) 382 S.W. 2d 343, a summary judgment was denied in an antitrust claim that defendants had submitted false nominations (oil and gas forecasts that are filed with a state regulatory agency, the Texas Railroad Commission) to obtain oil and gas allowables, *i.e.,* the right to produce oil and gas from a common source of supply, as part of a broader scheme to eliminate the plaintiffs as independent oil and gas producers. In both cases, it was held that it was not necessary to attack the validity of the order of the Railroad Commission granting the allowables and that the state commission's order remained unaffected by a finding that the submission of false nominations was part of an anticompetitive conspiracy and that the submissions of false nominations was private commercial activity, distinguishable from political activity or lobbying, and was therefore not immune from the antitrust laws.

The distinction between a public body's decision in an economic framework governed by market mechanisms subject to the antitrust laws and a political decision resulting from lobbying exempt from the antitrust laws is the subject of the Note, *Application of the Sherman Act to Attempts to Influence Government Action,* 81 Harv. L. Rev. 847 (1968).

In *American Cyanamid Company v. F.T.C.*, (D.C. Cir. 1966) 363 F. 2d 757, 769-770, it was held that the Federal Trade Commission had jurisdiction over the act of obtaining a patent by misrepresentation and the subsequent use of the patent so obtained—the fruits of such conduct—for the purpose of excluding competition, because the acts, in total, may be found to be an unfair method of competition violative of Section 5 of the Federal Trade Commission Act. It was further held that the proceeding was not an indirect attack on the validity of a patent and that the Federal Trade Commission Act contains no statutory exemption of Patent Office Proceedings. It was finally held that the Commission was not "second guessing" the Patent Office, because the Commission had before it evidence which it found to have been withheld from the Patent Office and passed upon a situation which the Patent Office never knew existed.

Reliance by the appellees on *Parmelee Transportation Company v. Keeshin*, (7 Cir. 1961) 292 F. 2d 794, cert. denied, 368 U.S. 944, 82 S. Ct. 376, 7 L. Ed. 340 (1961), is misplaced. In that case the cause of action was not based on economic activity, but on bribery of a governmental official, who in turn influenced the decision of railroad companies that had invited competitive bidding on an exclusive baggage pick-up contract. There was no private commercial activity in an economic framework. It was stated in the majority opinion, 292 F. 2d at 803-804:

> "No interested bidder for the contract was prevented from competing for it. . . The competition between plaintiff and Transfer was always intense and finally became feverish . . . The case made out by plaintiff's offers of proof and evidence re-

flects the unusual attention which high officials of the railroads bestowed upon the bidding. An assertion that the competitive market for this contract was destroyed or that the competition for it was eliminated is belied by the record. While one competitor succeeded and necessarily the other failed, unmistakably there was very strenuous competition. This unavoidable fact undermines the plaintiff's charges under §§ 1 and 2 of the Sherman Act. Nor is this result precluded by the fact that the victory of the successful bidder was made easier by the wrongful conduct of a public official."

However, there was a dissenting opinion which stated, 292 F. 2d at 806:

"The majority opinion apparently recognizes that under the Yellow Cab case, a conspiracy among sellers of transfer service is illegal. I am aware of no reasonable basis for holding that an identical conspiracy between a group of buyers, a public official and one seller is not likewise proscribed."

The court below appears to have relied on the principle that it should not sanction a collateral attack upon the official acts of public authorities in a litigation to which the authorities are not parties and that, until a direct attack has been successfully made and the contrary shown, it must be assumed that the action of the public officials was a proper exercise of their official powers. *Cf. Brandt v. Winchell,* 3 N.Y. 2d 628, 170 N.Y.S. 2d 828 (1958).

However, the defendants should not be absolved from liability by official action where they have themselves artfully contrived and strategically maneuvered

the plaintiff into the precarious position which renders the plaintiff subject to governmental action. The defendants' activity was the prime producing cause of the conditions leading to the award of an exclusive franchise to Clark Sanitation.

R. J. Collet, president of the appellant, testified in his deposition, when asked whether he thought the Commissioners acted within the scope of their authority in awarding the franchise [R. 4611]:

> "I don't think that that is what my case is all about. I think that I am approaching this from the standpoint that there was a situation created that brought about the invitation for a franchise and what not. This is my objection to the method that the franchise was actually—bid was actually originated. The entire situation from the inception of the—even the thought of granting a franchise in the County. I don't think that I have got any real quarrel with the County Commissioners. I am not quarreling with them. I am saying that my competitor created the situation."[4]

R. J. Collet then added, "I don't profess to know anything about law, whatsoever. I don't stay on top of the laws." [R. 4611-4612].

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[4]The declarations of the plaintiff as to a conclusion of law, opinion, legal contention or argument, as distinguished from a statement of fact, are not deemed admissions. *Fibreboard Paper Prod. Corp. v. East Bay Union of Mach.* 227 Cal. App. 2d 675, 39 Cal. Rptr. 61, 85-86 (1964). Therefore, appellent has argued in Propositions VI, VII and VIII, *infra* that the grant of the franchise by the County Commissioners was action in excess of the outer perimeter of statutory authority, regardless of the Collet declarations quoted herein. Furthermore, the true meaning of the declaration is that the damage suit has not named the County Commissioners as defendants, but has been directed against the private members of the unlawful combination.

In *United States v. General Electric Co.* (D.N.J. 1949) 82 F. Supp. 753, 851-852, it was recognized that a public body which invites competitive bidding on lamps has the authority to require "Mazda" lamps even if the lamps are procurable from only one source or a limited number of sources, but that if two manufacturers as part of a scheme to exclude competition from public business participate in the preparation of specifications which are drawn for the purpose of precluding competitors from submitting a responsive bid and then bid for the government contract, such conduct may be found subject to the antitrust laws. For the form of the decree, see *United States v. General Electric Co.,* (D.N.J. 1953) 115 F. Supp. 835, 858.

In *De Long Corporation v. Lucas,* (S.D.N.Y. 1959) 176 F. Supp. 104, 123, affirmed (2 Cir. 1960) 278 F. 2d 804, 810, the defendant breached a two-year covenant not to compete, thereafter submitted a bid for a government contract and thereafter was awarded the contract. The Court held that the breach of the covenant against competition was the proximate cause of the plaintiff not being awarded the government contract, despite the fact that actual bidding took place after the restricted period had expired.

In *Pedersen v. United States,* (D. Guam 1961) 191 F. Supp. 95, the Court recognized the tort of interference with the prospective advantage of a bidder for a government contract by supplying false information to the public official charged with the responsibility of awarding the contract.

In *Okefenokee Rural Elec. Mem. Corp. v. Florida P. & L. Co.*, (5 Cir. 1954) 214 F. 2d 413, 418, which recognized the immunity from the antitrust laws of influencing valid governmental action, the Court stated:

> "In the case mainly relied on by the appellant, Angle v. Chicago, St. Paul, etc., Railway Co., 151 U.S. 1, 14 S.Ct. 240, 38 L.Ed.55, the plaintiff's legal rights had been violated because the defendant had wrongfully induced another company to break its contract with plaintiff with resultant damages independent of the Legislature's action."

It is clear that the bids were to be considered in an economic framework governed by market mechanisms.

In *Yohe v. City of Lower Burrell*, 418 Pa. 23, 208 A. 2d 847, 850 (1965), the Supreme Court of Pennsylvania explained the reason for the statutory requirement for competitive bidding before a contract for garbage pick-up and disposal service can be granted by a governmental body:

> "The need for bidding requirements is just as compelling in the instant case where the garbage collector is compensated directly by the recipients of his service as it is when the recipients pay for service through the conduit of the municipal treasury. In each case, regardless of who makes the final payment, it is the taxpaying citizen who provides the necessary funds and whose interest must be protected . . . The language of the Act compels the interpretation that competitive bidding is required on these contracts even though the money

comes directly from the taxpayers rather than from the city treasury. It has been argued that bidding deprives a city council of its discretion to evaluate the responsibility or competency of each applicant and forces a council to base its award upon how much a potential garbage collector asks for his services. This argument . . . ignores the control which a city maintains over bidders through appropriate specifications, . . . and through contractual provisions."

In *Price v. Philadelphia Parking Authority,* 422 Pa. 317, 221 A. 2d 138, 147, Footnote 26 (1966), in which it was decided that a statute imposed the requirement of competitive bidding by the use of the words "on a fair competitive basis", referring to a contract to be granted by a public body, the Court added:

"Our conclusion that the duty to employ competitive bidding is imposed by the Act is reinforced by consideration peculiar to air-right leaseholds. Due to their recent advent, standards by which such leaseholds may be valued have not yet evolved. By requiring competitive bidding, the Legislature has established a method by which the 'marketplace' will operate to ensure that such leases are not entered into in an arbitrary and capricious manner, whether by reason of favoritism or good faith mistakes in valuation."

VI.

THERE WAS A GENUINE FACTUAL ISSUE WHETHER THE PROCEDURES ADOPTED BY THE COUNTY COMMISSIONERS DESTROYED THE FREE COMPETITION ON A COMMON BASIS THE STATE STATUTE DEMANDED, AND A FRANCHISE GRANTED IN VIOLATION OF THE STATUTORY REQUIREMENT WOULD BE ACTION BEYOND THE OUTER PERIPHERY OF STATUTORY AUTHORITY AND THEREFORE WITHOUT IMMUNITY FROM THE ANTITRUST LAWS.

The court below held that one of the plaintiff's claims which finds inferential support in the evidence is that the procedures adopted for award of the franchise were illegal [R. 1094]. The memorandum opinion did not particularize the illegalities. The court below concluded that, if the franchise was unlawfully granted, the remedy is to attack the franchise [R. 1098]. The memorandum opinion was silent as to whether the franchise could be attacked as part of a private antitrust action and, if so, upon what grounds.

It has been held that in a common-law action for damages by the holder of a franchise for loss of profits resulting from the operation by a competitor in excess of statutory authority, the plaintiff has a right to attack the legality of the defendant's operation and show it is action beyond the outer periphery of stautory authority.

In *Menzel Estate Co. v. City of Redding*, 178 Cal. 475, 174 Pac. 48 (1918), the defendant City of Redding was held liable for loss of profits resulting from the erection of a bridge in competition with a ferry concluded by the plaintiff under an exclusive franchise. The defendant contended that its bridge was authorized

under its declaration of public convenience, but it was held that the City of Redding had no statutory authority to make such a declaration of public convenience and thus attempt to violate the franchise of an existing ferry. The Court stated, 174 Pac. at 51:

> "The city of Redding therefore is in essentially the same position which a private individual would occupy, if without warrant of law he had constructed the bridge and injured the property of the respondents."

In *East Bay Garbage Co. v. Washington Tp. Sanitation Co.,* 52 Cal. 2d 708, 344 P. 2d 289 (1959), the plaintiff was held liable on a counterclaim by the defendant, who held an exclusive franchise for garbage pick-up and disposal in Fremont, California, for loss of profits resulting from a competing operation by the plaintiff. The plaintiff contended in opposition to the counterclaim that its operation was authorized under a prior contract with a sanitary district whose boundaries encompassed Fremont, California. The contract between the plaintiff and the sanitary district was awarded without competitive bidding required by state statute, and so the plaintiff's competitive operation was held to be in excess of statutory authority. To the plaintiff's contention that the plaintif's contract could be attacked only by a direct proceeding in *quo warranto,* the Supreme Court of California answered, 344 P. 2d at 292:

> "(Plaintiff) cannot properly object to defendant's attack on the validity of such contract coincident with defendant's assertion of a legal right to the garbage collection privilege in the area in question."

The plaintiff in the case at bar has a primary right not to have its business injured by a pattern of conduct violative of Sections 1 and 2 of the Sherman Act. In a private antitrust action to enforce that primary right by the remedy of damages, where the injury results from a pattern of conduct which would be unlawful but for a defendant's contention that its conduct was state-directed, the plaintiff has a right to show that the injurious conduct was carried out in excess of statutory authority and was therefore not state-directed.

In *Alabama Power Co. v. Alabama Electric Cooperative, Inc.*, (5 Cir. 1968) 1968 CCH Trade Cases ¶ 72,398, a privately owned electric utility invoked the antitrust laws to challenge the requirement in the grant of a Rural Electrification Administration (REA) loan to a generation and transmission co-operative that the borrower shall obtain 35-year contracts with its distribution members obligating them to purchase all of their electric requirements to the extent that the borrower shall have power and energy available. The plaintiff showed that in certain instances the co-operative distributors would purchase all or part of their power supply from it. However, the "all requirement contracts" required the distribution co-operative to terminate, at such time as it might legally do so, its contracts with other power suppliers upon request of the generation and transmission borrower made with the approval of, or at the direction of, the Administrator. The defendants showed that the Rural Electrification Administration had followed a customary and long-established practice of requiring that its borrowers enter into 35-year-old-requirement contracts with the distribution co-operatives as security for the repayment of the loan

over a period of 35 years and that the REA had discretionary authority under the governing statute to determine what was adequate security for the loan. The majority opinion concluded that, since the Rural Electrification Administration had statutory authority to determine in its discretion what was adequate security and its practice was to exercise discretion as it did in this case, the agency's determination that its requirement in the loan carried out the statute was conclusive and the only legal conclusion the court could reach was that the action of the Rural Electrification Administration was clearly not beyond the outer perimeter of statutory authority. Thus, the majority opinion never reached the issue whether the plaintiff could in the antitrust action attack the agency requirement as action in excess of statutory authority.

The majority opinion, however, did add, 1968 CCH Trade Cases at page 85, 209:

> "A different question might be presented if the Administrator went beyond the outer perimeter of the authority vested in him by the statute, or as expressed in *Hardin v. Kentucky Utilities Co.,* cited *supra,* note 3, '* * * outside the range of permissible choices contemplated by the statute.' "

The dissenting opinion, holding that there was evidence that the loan was made in violation of the "central station service" limitation contained in Section 4 of the REA Act and that a genuine factual issue existed, therefore, on the question whether the action exceeded

the outer perimeter of authority, stated, 1968 CCH Trade Cases at pages 85, 217:

> "The majority acknowledge a possible application of the antitrust laws if the Administrator went beyond the outer perimeter of the authority granted him by statute."

In *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 689-690, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949), it is stated:

> ". . . (W)here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief."
>
> "The fundamental reason why persuading a sovereign power to do this or that cannot be a tort * * * is that it is a contradiction in terms to say that, within its jurisdiction, it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper."
>
> *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358, 29 S. Ct. 511, 513, 53 L. Ed. 826, 833 (1909).

Conversely, where the action brought about is in excess of authority, the sovereign has not declared it proper and it can be a tort to bring it about, thereby removing the immunity from the antitrust laws. *Cf. S & S Logging Co. v. Barker*, (9 Cir. 1966) 366 F. 2d 617.

A federal court whose jurisdiction has been invoked under the antitrust laws has a duty to decide questions of state law when necessary to the rendition of a judgment, especially where good cause does not appear for postponing the exercise of federal jurisdiction pending determination by a state court of a controlling question of state law. *Mach-Tronics, Incorporated v. Zirpoli,* (9 Cir. 1963) 316 F. 2d 820, 824; *Cf. Tomiyasu v. Golden,* (9 Cir. 1966) 358 F. 2d 651; *White v. Husky Oil Company,* (D. Mont. 1967) 266 F. Supp. 239.

In the authorities cited in the memorandum opinion of the court below, the governmental action which furnished immunity from the antitrust law was clearly valid governmental action in compliance with state law. In the case at bar, by contrast, there was a genuine factual issue remaining for trial whether the bidding procedures referred to by the court below as illegal in practical effect destroyed the free competition on a common basis which the statute demanded. A court is prohibited from "overlook(ing) the necessity of inquiry beyond the form." *American Federation of Musicians v. Carroll,* 88 S. Ct. 1562, 1568 (1968).

Appellant incorporates herein by reference Paragraph D(4)(c) of the Statement of Facts, *supra,* which recites the inferential evidentiary support for the conclusion that the competitive bidding required by the statute was destroyed. The bid documents, the bid variables and the conditions of bidding were tailored to handicap bidders other than Clark Sanitation. Under such circumstances, the franchise would be null and void. In Nevada, violation by County Commissioners of a statutory requirement of competitive bidding is action beyond the outer perimeter of authority.

The Supreme Court of Nevada stated in *Sadler v. Eureka County*, 15 Nev. 39, 42 (1880):

> "The powers of the commissioners and the mode of exercising them, being derived from the statute must necessarily depend upon its true construction.
>
> "The restrictive provisions of the statute were evidently inserted for the protection and benefit of the public, and were intended to guard against favoritism, extravagance, or corruption in the letting of contracts for any public work. When the commissioners act under such authority, they must strictly follow all the conditions under which the authority is given.
>
> "The law is well settled that county commissioners can only exercise such powers as are especially granted, or as may be necessarily incidental for the purpose of carrying such powers into effect; and when the law prescribes the mode which they must pursue, in the exercise of these powers, it excludes all other modes of procedure."

See *State v. Boerlin*, 30 Nev. 473, 98 Pac. 402 (1908); *State v. Haeger*, 55 Nev. 331, 33 P. 2d 753 (1934); *Canton v. Frank*, 56 Nev. 56, 44 P. 2d 521 (1935).

The same principle is well established in California, where it has been held as follows: An implied liability to pay on *quantum meruit* for benefits received by a governmental body could not exist, where the statute prohibited against contracting in any other manner than as prescribed therein and the statutory prohibition was disregarded; compliance with a statute was mandatory and adoption of a mode prescribed in a statute was a juris-

dictional prerequisite to the exercise of the power to contract at all and disregard of the prescribed mode would make the contract void; where a governmental body has disregarded the mode prescribed by statute, liability could not arise by estoppel or ratification; a person dealing with a public body is chargeable with knowledge of the limitation of its authority; and, when he deals in matters expressly provided in a statute, he is bound to see that the charter is complied with. *Zottman v. City and County of San Francisco*, 20 Cal. 96; *Reams v. Cooley*, 171 Cal. 150, 152 Pac. 293 (1915); *Miller v. McKinnon*, 20 Cal. 2d 83, 124 P. 2d 34, 140 A.L.R. 570 (1942); *Dynamic Industries Company v. City of Long Beach*, 159 Cal. App. 2d 204, 323 P. 2d 768 (1958).

It is stated in *Reams v. Cooley*, *supra*, 152 Pac. at 294:

> ". . . (T)he decided weight of authority is to the effect that, when by statute the power of the board or municipality to make a contract is limited to a certain prescribed method of doing so, and any other method of doing it is expressly or impliedly prohibited, no implied ability can arise for benefits received under a contract made in violation of the particularly prescribed statutory mode. Under such circumstances the express contract attempted to be made is not invalid merely by reason of some irregularity or some invalidity in the exercise of a general power to contract, but the contract is void because the statute prescribes the only method in which a valid contract can be made, and the adoption of the prescribed mode is a jurisdictional prerequisite to the exercise of the power

> to contract at law, and can be exercised in no other manner so as to incur any liability on the part of the municipality."

The County Commissioners have no authority delegated by statute to formulate procedures that handicap bidders. Where such procedures have been adopted, a legal duty has not been validly undertaken. The activity of the County Commissioners is not suggestive of, or peripheral to, specific delegated authority. Therefore it is beyond the outer perimeter of an official line of duty.

The governing state statute, NRS 244.187, from which the County Commissioners derive their authority to grant an exclusive franchise for garbage pick-up and disposal service in an unincorporated area has been interpreted by the decision of the lower state court of Nevada to require competitive bidding as the method by which the County Commissioners must proceed to grant such a franchise.

A federal court treats with respect a decision of a lower state court in the absence of decisions of the highest appellate court of the state showing that the state law is other than that announced by the lower court. *Commissioner v. Bosch*, 387 U.S. 456, 465-466, 476, 87 S. Ct. 1776, 18 L. Ed. 2d 886, 893-894, 900 (1967).

In the state court decision rendered January 16, 1963, in the case entitled *Sun Valley Disposal Co., Inc. v. Harley Harmon, et al.*, Case No. 111634, in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, the District Judge held [R. 1121-250 to 251]:

> "* * * Defendants assume the position that competitive bidding is not required by the statute.

We might agree that such is not spelled out in words of one syllable, however, the statute will admit of no other construction than that bids or proposals must be considered, and ipso facto, whether it be related to dollars or services, the Commissioners choose the bid or proposal that is most advantageous to the public. The statute reads in part:

> 'The Board of County Commissioners shall give full consideration to any application or bid to supply such services, if received prior to the expiration of such 30-day period, and shall grant the franchise on terms most advantageous to the County and the persons to be served.'
>
> "* * *
>
> "Plaintiff's quarrel rests upon the lack of specifications of any kind so as to establish some basis for competitive bidding. * * * No specifications of any kind were included that would create a standard for competitive bidding. * * *"

The state court's findings of fact, conclusions of law and judgment were entered April 4, 1963 [R. 1121-255]. The judgment was not appealed from. The conclusions of law rendered by the lower state court were expressly acquiesced in as controlling the procedure to be followed by the County Commissioners in granting an exclusive franchise for garbage pick-up and disposal [R. 1121-361].

Among those conclusions of law was the following [R. 1121-262]:

> "10. An enforceable contract was not entered into between the Board of County Commissioners and Defendant, Clark Sanitation, Inc., because Defendant Clark Sanitation, Inc.'s bid could not be lawfully accepted by the Board, since there was no equal opportunity to bid on a competitive basis."

The governing Nevada statute, NRS 244.187, did not authorize the County Commissioners to eliminate in advance the rate to be charged the public as a bid variable. The statute merely authorized the County Commissioners to fix the rates charged by a franchise holder, which means after the franchise was awarded. In its pertinent part, the statute reads as follows:

"* * *

"2. The board of county commissioners may, by ordinance, regulate such services and fix fees or rates to be charged by the franchise holder."

The history of the statute in that it was enacted by the Nevada legislature on March 17, 1960 [R. 1003]. On April 5, 1960, the County Commissioners of Douglas County, Nevada, passed a resolution to proceed with an invitation to bid pursuant to the recently enacted statute [R. 1004-1013]. The bid documents show that the franchise fee was fixed in advance as one (1%) percent of the total receipts, but that on the subject of rates the Notice of Intent to Grant Franchise stated [R. 1023-1024]:

"* * *

"3. . . . The initial monthly rate shall be that bid by the person whose bid for the franchise is accepted by the Board of County Commissioners.

"4. The successful bidder shall provide garbage collection and disposal service as herein specified . . . at such uniform rates as are fixed by the Board of County Commissioners. No hearing shall be held to change any rate for garbage collection under this franchise within six (6) months after such rate has been fixed or changed by the Board of County Commissioners after hearing, nor shall the rate for garbage collectors from dwelling houses initially fixed by the ordinance granting

> the franchise be modified within one year after the date said ordinance is adopted."

In the case of Washoe County, Nevada, the bidder was required to state, among ther things, "estimates of cost for the collection service and disposal service, separately computed." [R. 1028]. The bids submitted contained the proposed garbage pick-up charge [R. 1038, 1046].

In the case at bar, involving Clark County, Nevada, the County Commissioners fixed the rates to be charged in advance by Ordinance No. 214 passed June 8, 1964, in Section 15 [R. 1121-353 to 359].

In *Thomas Harrington's Sons Co. v. Mayor, etc., Jersey City,* 78 N.J.L. 610, 75 Atl. 943 (1910), it was held that, where a statute required the garbage contract to be awarded on terms most advantageous to the city,

> "this may depend upon a weighing of the relative importance of the difference in the money cost and the difference in favor of the character, experience, and ability to perform the contract of the highest bidder."

VII.

THERE WAS A GENUINE FACTUAL ISSUE WHETHER THE INVITATION FOR BIDS WAS A SHAM THAT EVADED THE FREE COMPETITION ON A COMMON BASIS THE STATE STATUTE DEMANDED, AND A FRANCHISE GRANTED IN VIOLATION OF THE STATUTORY REQUIREMENT WOULD BE ACTION BEYOND THE OUTER PERIMETER OF STATUTORY AUTHORITY AND THEREFORE WITHOUT IMMUNITY FROM THE ANTITRUST LAWS.

In Proposition VI of the Argument, *supra,* it has been demonstrated how a genuine factual issue has

arisen that the competitive bidding required by the state statute was destroyed. Appellant incorporates herein by reference Paragraphs D (4)(c) and (d) of the Statement of Facts, *supra*. These inferential facts must be viewed against the statement in the memorandum opinion of the court below that one of the plaintiff's claims which finds inferential support in the evidence in that one or more of the County Commissioners favored Clark Sanitation for personal selfish reasons unrelated to the public interest [R. 1094]. There is a triable question whether the invitation for bids was a sham, done only to appear to comply with the law and to clothe the proceedings with the habiliments of legality. *Heyer Products Company v. United States*, 135 Ct. Cl. 63, 140 F. Supp. 409, 413 (1956). The fact-finder may reasonably conclude that the proceeding before the County Commissioners was a subterfuge to evade competitive bidding. See *United States v. Raub*, (7 Cir. 1949) 177 F. 2d 312, 314. Clearly, such a conclusion would render the franchise subject to attack in a private antitrust action not only for the reasons set out in Proposition VI of the Argument, *supra*, but also for the following reason:

> "It is a maxim of every country that no man should be judge in his own cause. The learned wisdom of enlightened nations, and the unlettered ideas of ruder societies are in full accordance upon this point, and wherever tribunals of justice have existed, all men have agreed that a judge shall never have the power to decide where he is himself a party. In England it has always been held that, however comprehensive may be the terms by which jurisdiction is conferred upon a judge, the power

to decide his own cause is always a tacit exception to the authority of his office. Such I conceive to be the law of this state." *Wash. Ins. Co. v. Price,* 1 Hopk. Ch. (N. Y.) 1.

A fortiori the County Commissioners have no power to decide that their invitation for bids was a sham.

Where the existence of a fact is an indispensable condition before a board can act and that board is not clothed with the power to find the fact, the question whether the fact exists may be inquired into collaterally. *State v. Porter,* 23 N.M. 508, 169 Pac. 471 (1917); *Kenney v. Bank of Miami,* 19 Ariz. 338, 170 Pac. 866 (1918); *Beardslee v. Dolge,* 143 N.Y. 160, 38 N.E. 205 (1894); *Miller v. City of Amsterdam,* 149 N.Y. 288, 43 N.E. 632 (1896).

VIII.

THERE WAS A GENUINE FACTUAL ISSUE WHETHER THE GRANT OF A FRANCHISE WAS INFLUENCED IN FUTHERANCE OF ANTICOMPETITIVE CONSPIRACY PARTICIPATED IN BY ONE OR MORE COUNTY COMMISSIONERS, AND SUCH CONSPIRATORIAL CONDUCT WOULD BE SUBJECT TO THE ANTITRUST LAWS.

The proof that the invitation for bids was a sham and that one or more County Commissioners favored Clark Sanitation for personal selfish reasons unrelated to the public interest permits the fact-finder to conclude that one or more County Commissioners joined an anticompetitive scheme and in furtherance thereof influenced the grant of the franchise. Such conspiratorial conduct would be subject to the antitrust laws. *Harmon v. Valley National Bank,* (9 Cir. 1964) 339 F. 2d 564;

Bankers Life and Casualty Company v. Larson, (5 Cir. 1958) 257 F. 2d 377; see *Independent Taxicab Operators' Ass'n v. Yellow Cab Co., supra*, 278 F. Supp at 985; *Eastman v. Yellow Cab Co.*, (7 Cir. 1949) 173 F. 2d 874, 881.

Where the interests of the persons charged to have joined the combination are not divergent and there is no overwhelming evidence of their motive to demonstrate conclusively non-conspiratorial motives, a jury question is presented as to the interested County Commissioners' motives in relation to the issue of joinder of conspiracy and a summary judgment is precluded. *Cf. First National Bank of Arizona v. Cities Service Co., supra*, 88 S. Ct. at 1587.

The court below erroneously concluded that a conspiracy cannot be actionable if it is predicated for its accomplishment upon influence, rightful or wrongful in character, to instigate governmental action and irrespective of whether or not the official is named as a co-conspirator [R. 1097-1098]. The reasons for the erroneous character of the District Court's conclusion are as follows: Firstly, the enlistment of a friendly public official to harass competitors can be a powerful tool in the most vicious sort of anticompetitive effort. Note, *Application of the Sherman Act to Attempts to Influence Government Action, supra*, 81 Harv. L. Rev. at 856, Footnote 51. Secondly, there is no authority, statutory or otherwise, authorizing a private outsider to influence an official to join a conspiracy to restrain commerce or exempt them from suit if they do so. *Bankers Life and Casualty Company v. Larson, supra*, 257 F. 2d at 381.

CONCLUSION.

The appellant recognizes the legitimate function of the summary judgment rule, that is, to obviate trials which would serve no useful purpose. However, in a recent dissenting opinion, Mr. Justice Black, with whom the Chief Justice and Mr. Justice Brennan joined, has warned:

> "The plain fact is that this case illustrates that the summary judgment technique tempts judges to take over the jury trial of cases, thus depriving parties of their constitutional right to trial by jury." *First National Bank of Arizona v. Cities Service Co., supra,* 88 S. Ct. at 1600.

For the reasons which we have set forth, the summary judgment appealed from should be reversed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MORTON GALANE.